6-2018

Deference to Deference: Examining the Relationship between the Courts and the Political Branches Through Judicial Deference and the Chevron Doctrine

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Submitted in partial fulfillment

of the requirements for

Honors in the Department of Political Science

UNION COLLEGE

June, 2018

Abstract:

YAO, CHRISTOPHER Deference to Deference: Examining the Relationship between the Courts and the Political Branches Through Judicial Deference and the *Chevron* Doctrine

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Judicial review of agency rulemaking sits atop a nexus between all three branches of American government, the legislature, the executive, and the judiciary. *Chevron v. NRDC* (1984), a landmark case in administrative law, and its resulting doctrine of strong judicial deference to agencies in their interpretations of statute, are paradoxical in their creation. Although *Chevron* was decided at the height of Reagan-era deregulation, it greatly enhanced the power of administrative agencies, allowing them to reinterpret the meaning of their statutory directives as needed to justify changes to regulations with less scrutiny from the courts. It is only in recent years that *Chevron* has attracted national attention, as members of Congress have proposed legislation to force the courts to eliminate judicial deference. More than thirty years after the *Chevron* decision, there is a political push against judicial deference that threatens its very existence. This research explores the creation and development of the *Chevron* doctrine and judicial deference as a whole through the lens of regime theory, focusing on the interaction between the Judiciary and the larger political environment. Congress often reacts to trends within the Judiciary, especially in areas that involve all three branches of government. How effectively Congress does or does not respond to these trends is influenced by the political narrative surrounding the issue. This research concludes that political coalitions that had previously been divided on an issue can be united and motivated by shaping and focusing on a constitutional narrative of the issue.

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Chapter 1: Theories of Judicial Decision Making

On July 30, 1981, then-president Ronald Reagan, speaking before a gathering of Georgian Republican luminaries only five months after assuming office, warned that "unless bureaucracy is constantly resisted, it breaks down representative government and overwhelms democracy…they set up the pretense of having autonomy over everybody and being responsible to nobody."[1] The start of the Reagan Administration in 1981 promised to be a time where conservatives dominated a variety of government institutions and sought to reduce the regulatory responsibilities of the federal government. Fast-forward to 1983 and it is ironic then, that the Reagan Administration's own push against Carter era regulations actually resulted in one of the most significant entrenchments of bureaucratic autonomy in the form of *Chevron v. NRDC* (1983).[2] Through this decision, administrative agencies were granted a strong level of deference in their interpretation of their statutory directives. Although it allowed the Reagan-era Environmental Protection Agency to narrow certain regulations, it ultimately gave agencies in the future a more expansive use of their powers. This legal doctrine, decided during the ascendency of anti-bureaucracy conservatism, codified judicial deference to agencies and still continues to persist over thirty years later and is still one of the most cited cases in the field of administrative law.

This controversial case, which grants a strong deference to agencies when determining the statutory scope of their mandates, has survived almost thirty years of criticism by both the left and right as well as several changes to its application. As the vignette above illustrates, the

[1] (Reagan 1981)
[2] (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 1984)

Chevron doctrine was created during time of intense suspicion of agencies, cementing the interpretive power of agencies into law. Despite this, it is only recently that the doctrine has been criticized as unsound on constitutional grounds.[3] Although there is no doubt that the overall scope of *Chevron* has been narrowed in some ways over the years,[4] its scope has also been enlarged in other areas. There has been no clear, sustained retreat from *Chevron* and its progeny on the part of the judiciary, but there has been a renewed political scrutiny of judicial deference by the political branches.

Chevron's unique location, on a nexus of all three branches of government, makes it important in understanding how the Supreme Court tries to navigate controversial areas that involve pressures from many different actors. *Chevron* is part of a large balancing act centered around the separation of powers, within which the Court must also try to juggle the desires of both the executive and the legislature. The ability of agencies to engage in rule making and promulgate regulations is limited by the scope of their statutory directives and what Congress "intends" for the natural limits of the agency to be. Although the judiciary responsible for divining the intent of Congress from these directives, they are often vague and undefined, leaving considerable room for agencies to maneuver. When considering Congressional intent, the Supreme Court must try to remain faithful in its responsibility to interpret the law in cases of ambiguity and silence from Congress. On the other hand, it must also recognize that there are often times when Congress remains ambiguous for one reason or another and simply chooses not to clarify the meaning of its laws. When examining whether or not an agency's interpretation of its statutory directive is "reasonable," the Court must similarly balance the expertise of agencies

[3] (Liu 2015)
[4] (Jellum 2007)

and what it sees as "good policy." Failing to adequately juggle these competing responsibilities could result in a disadvantageous showdown between the Supreme Court and one of the other branches of government.

By examining *Chevron* and judicial deference, it becomes clear that the national political regime which exists in the political branches can be greatly influenced by the ideas generated by the judiciary. These ideas are key in understanding how and why strong, national coalitions are formed around certain issues. *Chevron* illustrates the complex relationship that exists between the three branches of government. Judicial deference was originally a matter of administrative necessity, developed by the courts in order to cope with an ever increasing regulatory work load. The judiciary does not exist alone, however, and Congress took note of the trend towards increased deference. A strong coalition against judicial deference ultimately failed to hold because Congress, like the courts, viewed judicial deference as an administrative policy issue. The election of a strongly deregulatory executive in Ronald Reagan compounded these issues by creating a compelling, conservative policy rationale for judicial deference. Thus, amid these political fractures, *Chevron* and strong judicial deference was allowed to develop. The development of the *Chevron* doctrine in the 21st century, however, has helped generate constitutional concerns about judicial deference in the courts and in legal academia. By seizing on this new constitutional criticism, judicial deference has become constitutionalized in a way that unites an otherwise diverse coalition of opponents against the doctrine. In this way, Congress has found a solution to indecision on a policy issue by appealing to the Constitution, making it a more existential constitutional issue.

Models of Judicial Behavior and Decision Making

Analysis of why the Supreme Court makes the decisions it does has been a topic of acute interest, leading to the development of several different lenses used to try and understand the voting habits of justices. Theories of judicial decision making include the attitudinal model, the strategic decision model, ruling-regime thesis, and the "supply-side" theory of legal thinking. Justices, through the lens of the attitudinal model, decide cases based on their own sincere beliefs about a particular case.[5] The strategic model, in contrast, argues that judicial decisions do not necessarily result from the sincere preferences of the ruling judges. They are instead the product of sophisticated decision making in which judges vote in part based on how external actors will react to their decision.[6] The ruling-regime thesis sees judicial decisions as products of the preference of political majorities, rather than as counter-majoritarian decisions insulated from outside factors.[7] The supply-side theory looks at judicial decisions as part of a larger legal community, as the result of strands of legal theory developed by legal intellectual elites and implemented in practice by judges. These legal theories, which legitimate what judges can and cannot do, are "delivered" from the intellectual community to the judges through sophisticated networks of public interest law firms and other legal advocacy groups.[8] Finally, the historical-interpretive approach locates judicial decisions as the result of values that have become imbedded in the Supreme Court and, in the minds of justices and outside actors, provide guideline by which the Court is able to determine which cases to pursue and how to rule in those cases.

Although the attitudinal model provides some insight into the decision making of the Courts, it does so in an overly narrow context. One of the key assumptions of this model was that

[5] (Segal and Spaeth 2002)
[6] (Graber 2011)
[7] (Dahl 1957)
[8] (Teles 2008)

judges decide based on their sincere values against the merits of the case, which is to say that the dominating factors in any case are the facts of the case and what judges personally believe. The issue with this assumption is that, in taking a judge-centric view, ignoring that judges operate in a larger institutional context. In important ways, institutions like the Supreme Court are not simply neutral platforms for enacting personal policy-preferences. Howard Gillman points to institutional arrangements and historical contexts as a source of constrain in judicial decision making.[9] Even though justices on the bench may not be directly constrained by electoral and legislative concerns, they are still limited by other factors.

Can the attitudinal model explain *Chevron*? While it stands to reason that justices would not support an outcome that went against their most important beliefs, Mark Graber notes that this does not mean that cases are exclusively the product of policy preferences.[10] Using the attitudinal model to describe the *Chevron* lineage has limited application because *Chevron*'s location on a nexus of overlapping institutional concerns. *Chevron* is compelling because of its resilience across time. To look only at the preferences of individual justices when examining a chain of cases involving all three branches of government runs the risk of ignoring competing pressures from both within the Court and without. Although it is probable in every case that the individual preferences of the judges play a role in decision making, to confine analysis of *Chevron* and its progeny to the product of which ever justices happened to be sitting on the Court when those cases were decided ignores the continuity of the lineage. In *Chevron* in particular, the case was decided unanimously by justices from across the spectrum, ranging from the more conservative Chief Justice Burger to more liberal justices like Justice Brennan. It is unlikely that

[9] (Gillman 1999)
[10] (Graber 2011, 48)

that such a varied range of justices would all agree on *Chevron* based purely on their personal beliefs and on the merits of the case. Attitudinal considerations do not provide a satisfactory theoretical argument for why *Chevron* continues to influence Courts in the face of opposition.

The strategic choice model of judicial decision making provides a more complex lens through which to view Supreme Court cases. Federal judges, appointed by government officials for indefinite terms, are free from the pressures of election can devote themselves to producing "good policy outcomes", regardless of what those outcomes may actually be. But what the judge sees as good policy outcomes are not always the same as the outcome the judge sincerely believes is right.[11] Rather than merely using the Court to advance their own sincere values, justices must balance their own views with pressures that originate from a broad array of political actors, including Congress and the executive. In this model, justices may vote in opposition to their sincere beliefs in order to create the best policy outcome. In some ways, the judiciary in the strategic choice model is playing a "game" with other political actors. The goal of the Court in this analysis is to decide in the best possible manner to the responses of other actors. If voting in line with their preferences could cause produce a negative outcome, say a conflict with another branch of government that could weaken the Court, then justices will be more inclined to alter their voting habits in response to those factors and to produce a more positive outcome.

While this lens provides a more nuanced view of *Chevron* than that of the attitudinal model, acknowledging that justices do not decide in a vacuum separate from the rest of the world, it still ignores fundamental administrative concerns that the Supreme Court faces as an

[11] (Epstein and Knight 1998)

institution. After all, a core aspect of an institution's stability is simply being able to fulfill its directives. In the courts' case, they must, at a minimum, process the cases that come before them. In the strategic model, decisions are made from point to point and presume that the Supreme Court look primarily at how other institutions will react, with little emphasis on a larger pattern of decision making. Gillman argues that "the course of action that might best maximize the interests of the justices in the long run would be to act in a way that appeared principled rather than strategic."[12] Purely strategic decisions may, in fact, better be seen as merely tactical decisions. Tactics are necessary to win individual battles while strategy is necessary to achieve larger goals. In the context of the courts, the larger strategy may be to follow certain principles in order to maintain legitimacy or simply remain able to fulfill the basic work required. Although decisions in the strategic choice model may produce the best outcomes at that moment, they do not necessarily help the judiciary achieve its preferred long term goals and outcomes.

The ruling regime thesis has helped illustrate the ways in which judges, while technically insulated from democratic accountability, still vote in line with the national, ruling political group. The role of the Court as a policy-making institution that regularly votes in line with national political majorities, rather than as a counter-majoritarian institution, was popularized by Robert Dahl in his seminal work *Decision-making in a Democracy: The Supreme Court as a national policy-maker*. Rather than acting as a policy-making institution outside the democratic accountability inherent in other branches, Dahl argues that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[13] From this view, cases are decided in line with policies

[12] (Gillman 1999)
[13] (Dahl 1957, 570)

preferred the political majority and Supreme Court decisions tend to have a strong correlation with majority ideology. The main function of the Supreme Court, through this lens, is to legitimate the policy decision of the political majority.[14] By overlooking these important elements, the attitudinal theory assumes a unidirectional effect, that the Supreme Court as an institution is influenced by the current slate of justice and does not in turn influence them.

The original *Chevron* decision, made in 1984, itself may be a product of this sort of regime politics, as the decision helped solidify a level of agency power that was popular with the previous, more liberal administrations. Although the case was decided under a conservative president and with a Republican majority senate, Reagan had only appointed one new justice to the Supreme Court at that time. As a matter of fact, neither Reagan's then sole appointee to the Supreme Court, Justice Sandra Day O'Connor, nor the most conservative member of the Court, Justice William Rehnquist, participated in the decision. In the face of a rising tide of conservative ideology, regime theory would tell us that the justices of the Supreme Court decided *Chevron* in an attempt to protect the values of the previous regime. Difficulties arise, however, when examining the *Chevron* lineage of cases as a whole. The *Chevron* doctrine has not only managed to persist across both liberal and conservative administration in spite of changes to justices on the bench, but has also experienced some of its most significant expansions under the conservative Rehnquist Court.

The "supply-side" theory of judicial decision making argues that many, if not all, of the legal thinking implemented in the Supreme Court must first be generated and legitimized by academics. According to Steven Teles, "the increasing importance of ideas and professional

[14] *Ibid*, 581

power have led to a decline in the power of elections to cause comprehensive change… in highly insulated policy and institutional domains, such as law…"[15] In effect, the decisions made by the Supreme Court are constrained by intellectual support for those decisions. Without the proper intellectual and elite support structures, new legal ideas are unable to supplant more established legal doctrines. In particular, this lens can help explain why legal ideas retain their longevity while others are quickly phased out. Intellectual backing for certain ideas constrains the ways in which the Court can decide a case. If there is no backing for a specific decision, the Court is unable to legitimately rule in that was. In a sense, competing ideas must be "proven" as superior through a strong and vibrant intellectual community. Legal ideas require a strong intellectual backing before they can be transmitted to the courts.

This supply-side theory can help explain the course of judicial deference, particularly by focusing on the fact that ideas matter. The course of *Chevron*, from its long period of acceptance to the intense scrutiny it faces now, may be attributable in part to the direction of legal theory, rather than solely to the preferences of the justices or political bodies. If the intellectual base for eliminating deference to agencies does not exist, and the legal intellectual community is instead producing ideas involving strong deference, then it becomes more difficult to criticize the doctrine in a way that reaches across political cleavages. Ideas may generate specific legal outcomes, but they can also be created in response to court cases. In realms where the political and the legal overlap, the political branches of government often seek to emulate the law, taking legal ideas and concepts and bringing them into the political realm.[16] A strong intellectual backing of ideas does not guarantee that the Supreme Court will take them up and implement

[15] (Teles 2008, 3)
[16] (Silverstein 2009)

them through decisions. This means that supply-side theory can explain why justices on the Court had to choose from a specific set of ideas when deciding a case, but not why the justices chose a specific idea from that larger set. So, the supply-side theory may provide a partial picture of the why *Chevron* has survived, but not necessarily why it has evolved in the ways it has.

To understand *Chevron* and its descendants, it is important to recognize that their place in the administrative responsibilities of the Supreme Court and as particularly influenced by the other branches of government. When it comes to judicial deference, every branch has a stake in the issue. Regime theory tempered with a focus on the importance of ideas in unifying the national political regime can help explain *Chevron* and judicial deference as more than a series of cases, each decided in response to conditions unique to that case. This interpretive approach explains *Chevron* and, importantly, its political evolution, not as the product of the preferences of judges nor as the result of a strategic game against the other branches of government. It is instead the product of an institutional responsibility that necessitate establishing a judicial deference to agencies. Indeed, it can go even further to help explain why the *Chevron* doctrine has become an areas of intense criticism over thirty years after the case was first decided. The Supreme Court retains its institutional power and strength by "maintaining [a] coherent and defensible tradition"[17] in its case law and doctrines. In recent years, it has not done so with *Chevron*, creating a chaos that has given rise to new criticisms of the doctrine. Despite theories of judicial decision making based on either wholly legal or completely ideological justifications, the influence of institutional norms can be seen throughout a variety of Supreme Court cases and across Courts in general, affecting how cases are decided from one-time period to the next.

[17] *Ibid,* 80

Although the Supreme Court is filled with appointed judges who enjoy life tenure and is therefore not regarded as one of the political branches, a term reserved for executive and the legislative, this distinction is misleading as to the Court's true nature. The lack of democratic accountability in the selection of Supreme Court justices does not insulate them from the politics inherent in their work. Instead, judges are heavily influenced by and heavily influence the political environment that surrounds them and their Courts. Because *Chevron* in particular lies at the meeting points of all three branches of government, it is important to recognize the value of an institutional approach in understanding the judiciary. Judicial review of agency action is tricky on many levels, from the lack of expertise on the Court's part to the competing pressures from different parts of the executive and the legislative. Indeed, the Court has long been engaged with the other branches of government and has often made its decisions with due consideration of the surrounding environment. This responsiveness to the political environment has existed since the earliest parts of the history of the Court. In the seminal case of *Marbury v. Madison*, the Court, although sympathetic to the Federalist cause, recognized the likelihood of a constitutional crisis were it to side with Marbury and for partly that reason, amongst others, voted to strike down section 13 of the judiciary Act of 1789. With *Marbury*, the Court had made a decision that went beyond the preferences of the justices and beyond strict legal understanding, making a strategic vote based on its understanding of the Jefferson presidency. Foundational decisions like *Marbury* instilled the nascent judiciary with certain values that later influence the decisions of justices later in the Court's history. Examining how a new institutional analysis of other Supreme Court decisions has provided insights into the rationales behind those decisions can also shed light on its use in the context of *Chevron*.

Regime theory goes beyond just looking how the Court is influenced by Congress, instead also looking at when Congress chooses to defer to the Court's judgement on an issue. Elements of regime theory also explain how Congress and the courts behave when there is no strong, national regime on a particular issue. Graber argues Congress often pushes issues that it cannot, or does not, on to the courts to avoid the political repercussion of an actual vote.[18] Congress defers to the judiciary when issues bisect parties, rather than cut between them. If an issue bisects a political party, then resolving such an issue politically creates winners and losers within the same party. Rather than continue debate on such bisecting issues, which is unappealing because they create intra-party splits, In essence "Courts offer… opportunities for pushing unwanted fights off the political agenda."[19] By appealing to the judiciary to take the lead and substitute their judgement on a particular issue, congressional leaders can reduce the salience of an issue, at least temporarily.

Chevron and judicial deference provide an interesting variation on this particular facet of regime theory by highlighting how legislative deference works at the administrative agency crossroads. Congress, which writes agencies' statutory directive, ultimately has the final say on "what" it intended in the law. In that way, it also has the final say on whether or not the courts should defer to administrative agencies. Indeed, when judicial deference is presumed to be a product of tacit Congressional delegation of power to agency, Congress merely needs to pass a law saying that it does not tacitly delegate interpretive power to agencies and that the courts should not presume so. Why it has not done so, despite previous attempts, is illustrative of legislative deference.

[18] (Graber 1993)
[19] *Ibid.,* 41

Beyond just appealing to the courts on difficult issues, Congress has also often adopted legal language in their own debates and statutes in order to create a veneer of more "just" policies, rather than policies with political motivations. Gordon Silverstein argues that legal thinking, or at least attempts to emulate it by Congress, have had a significant impact on the ways in which we think about "good" politics.[20] By incorporating legal thinking into politics, or as Silverstein says "juridifying" politics, Congress hoped to avoid the most controversial and dividing aspect of legislations, "[shifting] policy disputes out of the murky and discredited realm of politics."[21] Politics and policy issues are often filled with grey areas of disagreement and compromise. In law, issues appear more clear-cut and directed towards either finding "justice" or else clearly defined by a single document, whether that document is part of statutory law or the Constitution itself.

Part of this trend is also the "constitutionalization" of issues by conservatives. Ken Kersch argues that conservatives have been able to unify otherwise diverse and fractious political coalitions on certain issues by appealing to the Constitution.[22] Constitutionalizing an issue and appealing to more fundamental law helps remove the issue from policy and politics. If politics is messy, constitutionalizing an issue constrain debate in a very real way. Whether or not an issue is constitutional is not a matter of whether or not that issue is politically acceptable or good policy. Instead, the debate becomes a battle over the fundamental acceptability of the issue. This constitutional-talk has a profound effect on the acceptability of issues. Kersch notes that "the history of American constitutional development provides many instances in which coherent constitutional theories work successfully to overcome potential veto points and countervailing

[20] (Silverstein 2009)
[21] *Ibid*., 8
[22] (Kersch 2018)

centers of power."[23] Ideas have power and how they are developed and delivered to the national dialogue is important in understanding why the framing of debates change. Judicial deference is one such issue that has been constitutionalized in recent years and understanding how this new constitutional frame has motivated renewed discussion of *Chevron* sheds light on how constitutional-talk is important in modern politics.

A regime theory analysis of *Chevron* and judicial deference, focusing on trying to establish a coherent narrative for the creation and criticism of the Chevron doctrine, requires an in-depth analysis of primary documents. Primary documents help shed light on the potential intellectual influences that the Supreme Court takes into consideration when making its decisions and on the surrounding political environment. For a chain of cases like the Chevron lineage, a wide range of documents is necessary in order to fully understand the extent of possible influences on the Court, administrative or political, requires looking at the concerns raised during courts cases as well as the concerns raised in Congress.

Supreme Court majority opinions provide a straightforward indication of the Court's rationale on the specifics of a case. The Chevron doctrine changes over time in the way it does because the Court, when applying it to particular cases, chooses in its majority opinions when to simply apply it and when to make alterations to the doctrine, either to expand its reach or narrow the ways in which it can be applied in that specific case and when it will be applied in future cases. In addition to the majority opinions of the Court, concurrent and dissenting opinions provide insight into competing lines of thought that the Court could have adopted as well as

[23] (Kersch 2018, 1091)

providing the foundations for future arguments. These separate opinions work to provide alternative explanations for what the Court may legitimately do or not do.

Congressional hearing records and political briefs are invaluable in locating *Chevron* and judicial deference in the wider political field. These documents provide firsthand accounts of how the political branches of government viewed judicial deference and *Chevron* and how those view shifted over time. Legislation proposed to affect and limit judicial deference also illustrates how Congress has, at times, felt a need to directly intervene with the Court's decision making process.

Decisions and opinions from lower Courts, such as the United States Courts of appeals, also provide insight into the intellectual strands of thought influencing Supreme Court decisions. Lower Courts are often cited as acting as "laboratories" for developing constitutional theory, experimenting with different legal ideas in their rulings that then "percolate" up to the Supreme Court over time.[24] Looking at lower Court decisions allows us to trace legal development that occurs at a lower level, then rises up to the Supreme Court. Because the Chevron doctrine has more often been invoked and used in the lower Courts than the Supreme Court,[25] there is likely to be more opportunities for development of the Chevron doctrine in lower level Courts than on the Supreme Court. Although not all, or even most, of the lower Court developments are adopted at the level of the Supreme Court, tracing ideas that were adopted by the Supreme Court to their lower Court of origin would shed light on the original rationale and source of those ideas.

In addition to decisions from the Courts themselves, *amicus Curiae* briefs, and briefs by the petitioners and respondents of cases, illustrate the possible intellectual basis for Supreme

[24] (Armour 2008)
[25] (Barnett and Walker 2017)

Court decisions that have been developed in the external environment. *Amicus curiae* briefs, briefs submitted by third parties on behalf of one of the litigants, are particularly useful in demonstrating the pool of intellectual resources available to the justices on the Court. Briefs submitted by various interest groups and public interest law firms are the product of idea-development and mobilization on the supply side of the legal system and provide judges with the justifications necessary to decide cases in certain ways. Gilman argues that "the numbers, needs, experiences, and perspective of litigants establish the context within which the justices perform their responsibilities."[26] By examining the briefs submitted by the litigants, we can establish some of the expectations and pressures on the Court during that particular case, as well as contextualize the environment in which these decisions were made.

A Road Map Through Chevron

The following chapters of this thesis will examine the evolution of judicial deference and the *Chevron* doctrine as an administrative tool and determine the political conflicts that have motivated discussion around the doctrine. Chapter 2 traces the origins of judicial deference to administrative agencies and the executive in general, beginning with the initial stages in the 1950s and continuing through the period of doctrinal standardization that occurred in the 1970s. By starting here, this paper will locate Chevron in a wider context, as part of a larger discussion of administrative concerns by the judiciary in an era of increasing regulation by agencies. This chapter will also look at standards of deference used by the Court prior to the initial *Chevron* decision, such as the *Skidmore* balancing test, in order to determine what compelled the Court to begin its push towards stronger and more consistent forms of deference. An analysis of these

[26] (Gillman 1999, 85)

prior legal constructs and their justifications will illuminate the factors that necessitated that the Supreme Court move to a much stronger level as deference, as well as establish the initial environment of *Chevron* at time zero. Identifying the pressures and values that led to the creation of Chevron sets the stage for further discussion of the doctrine's evolution.

Chapter 3 switches from the judiciary to the legislative and executive, tracking the controversy surrounding judicial deference and the Bumpers Amendment to eliminate judicial deference. This time period is particularly important because Bumpers occurred only a few years prior to the *Chevron* decision and sparked a tense debate about judicial deference in Congress. A close examination of this period helps resolve an important paradox in the doctrine's creation, reconciling a highly deregulatory political regime with the agency empowering *Chevron* case. Congress and the executive were not unaware of the growing doctrine of judicial deference and how they viewed the doctrine and reacted to it is an important part of explaining *Chevron*. Even though Congress very close to eliminating judicial deference during the transition to the Reagan Administration, it ultimately refrained from doing so. Indeed, the debate around judicial deference became eerily quiet after the defeat of the Bumpers Amendment, reflecting an increased willingness in Congress to defer to the Court's own trajectory and views of deference.

Chapter 4 focuses on the various modifications to Chevron starting in the 2000s and continuing to more recent cases, looking at the first major change to the Chevron formulation in *U.S. v. Mead* and then the subsequent cases that have complicated the Chevron puzzle. This era in Chevron's history represents a time of great modification to the doctrine and demonstrates a change in how the Court approaches strong deference to agencies. While *U.S. v. Mead* imposed a significant limitation on when Chevron deference is applied, *National Cable & Telecommunications Association v. Brand X Internet Services* greatly expanded the influence of

Chevron deference within its remaining domain. Again, rather than simply abandon the doctrine and create a new one or letting Chevron remain as it was, the Court chose to, in a series of alternating cases, expand and limit Chevron's scope. At the same time, this tension was again recognized by Congress. In particular, Congress adopted the constitutional language used to criticize these changes, which have helped unify opposition to judicial deference within the Congressional Republican Party. This chapter explores the tension created between and by these competing standards of deference, the growing intellectual opposition to the doctrine on constitutional grounds, and how Congress has again begun to debate the desirability of judicial deference.

Chapter 5 concludes this paper by reflecting on the importance of framing an issue in rallying support for or against it. By bringing judicial deference from the realm of policy to the realm of the constitutional, Republicans have been able to frame *Chevron* in a way that reaches across the policy cleavages of the policy realm. Importantly, however, it was the courts and legal academics who played a pivotal role in generating these constitutional criticisms of *Chevron*. By adopting this legal language and appealing to the Constitution, judicial deference becomes a more black-and-white issue, free from the numerous policy concerns that had divided conservatives in the past.

Chapter 2: The Court's Post-War Approach to Judicial Deference

Attempting to analyze the Supreme Court's approach to deference in 1955, New York University law professor Bernard Schwartz wrote that anyone who relied on the Supreme Court for an explanation would almost most certainly declare "the more you explain it, the less I understand it."[27] The Court's attitude toward judicial review of administrative rule-making in the decades pre-ceding *Chevron*, and thus the attitude of the lowers courts, was indeed difficult to understand and was characterized by a haphazard, case-by-case approach that was not abandoned until the adoption of *Chevron*. This disorganized approach to deference persisted for a significant length of time without the Court creating any sort of formal reasoning for its varying, and often conflicting, decisions.

This chapter first lays out the key components of pre-*Chevron* deference that prevailed in the 1950s through the 1960s. The courts during this period attempted to wrestle with new limits imposed on judicial review of agencies by the Administrative Procedure Act (APA) and with the highly specialized nature of agency regulations. These developments occurred when the New Deal political coalition held power, during which there was a proliferation of administrative agencies and a general support for an increasing use of agencies to further policies. In a sense, the prevailing political regime did not apply pressure to the Court in this arena, something that would change as support for agencies eroded in the 1970s and 1980s This chapter then attempts to explain the transition to "strong" *Chevron* style deference, beginning in the 1970s, as a result of the incredible increases in the courts' caseloads and which spawned a variety of problems related to the inconsistent use of deference in the past. This time period also generated a great

[27] (Schwartz 1955, 1)

deal of academic thought on that framed it in a primarily administrative light, with focus being directed towards the benefits of judicial deference in handling new agency-related cases.

Although the Supreme Court and the judiciary are affected by the national political regime, they do not always move in lockstep with it. This phenomenon is important to understanding the context for the Court's approach to deference and ultimately its landmark decision in *Chevron*. The seemingly discretionary and, perhaps, arbitrary nature of the Court's earliest approaches to deference demonstrate that, without the pressures of a strong political regime the Court was apt to experiment in its decision making. Tracing the development of these early decisions, as well as properly noting the unique characteristics of the New Deal political regime, reveals that the Court created a legal environment that was rich in potential approaches to deference, but ultimately did not move towards a more uniform approach until increasing administrative pressures in the form of increased caseloads made judicial deference more desirable.

Judicial Deference in the 1950s and 1960s

Prior to the Administrative Procedure Act of 1947, courts were left to decide on their own how to approach administrative agency rulemaking. The Supreme Court's earliest attempts to elaborate on its standard of judicial deference revolved around the *Skidmore* balancing test, described by Justice Jackson arguing on behalf of a unanimous Court as "the weight of [deference to an administrative agency] in a particular case will depend upon the thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power

to control."[28] This test attempted to create a flexible test that would determine deference on a case-by-case basis without applying any strict guidelines. While the *Skidmore* balancing test elaborated a few criteria that the Court would later use in deciding deference to administrative agencies and was the clearest explanation of the Court's approach to deference, the Court ultimately chose not to rely heavily on *Skidmore* in its future cases. Rather, it would instead incorporate elements of the test into later deference doctrines.

Following the end of the second World War, Congress attempted to sharply mark the boundaries of the scope of judicial review of agencies through the Administrative Procedure Act (APA), which tasked courts to "decide all relevant question of law, interpret constitutional and statutory provisions"[29] when reviewing agency rule-making and to "set aside agency action… found to be arbitrary [or] capricious…[.]" Both these provisions would form the basis of the Court's approach to deference during the latter half of the New Deal era. The goal of the APA was to enforce a strict separation of powers on administrative agencies and to force agencies to participate in the adversarial court system.[30] There is some evidence that Congress attempted to use the APA as a tool to limit the Court's ability to experiment with new standards of deference.[31] Despite this goal and the language in the statute, the APA was unable to induce the courts to create a standardized deference test in the courts. In fact, the provisions of the APA have been interpreted to allow up to six different standards for judicial deference and as few as a single standard.[32] Depending on how the APA was read, its attempts to constrain the Court's approach to deference could be vastly limiting or relatively lax. The passage of the APA alone

[28] (Skidmore v. Swift & Co. 1944)
[29] 1 Pub. Law 404, Ch. 324, 79th Cong., 2nd
[30] (Sherwood 1947, 280)
[31] (Bamzi 2017, 989)
[32] (Antoine 2015)

did not create a coherent approach towards deference and, in some cases, only served to complicate the increasingly complex issue.

Following the passage of the APA, Congress left the field of judicial deference to the courts, remaining relatively uninvolved for a period of several decades. This era in the Court's history, from the 1950s until the end of the 1960s, represented a phase of experimentation, where the courts were free to engage in a variety of approaches to judicial deference without external political pressure. Both the Republican Party and the Democratic Party of this time period enunciated a continued support of administrative agencies. The 1956 Republican Platform went so far as to commend "the regulatory agencies under this Administration [for having] moved vigorously to end discrimination in interstate commerce."[33] During this time period, even Republican administrations leaned heavily on administrative agencies to provide support and overt condemnation of the administrative state was absent from Republican platforms during this time.

As a result of this, there was a lack of regime pressure from either party on the Court to decide cases involving deference to agencies in any particular way. The Eisenhower Administration in particular relied heavily on administrative agencies to implement its policies and allowed agency head relatively large amounts of discretion in their work. [34] Regime theory predicts that the Court generally aligns with the ruling political regime. Absent a strong regime certain policy areas, the Court is left to its own devices. Bernard Schwartz, writing in 1955, noted that "present-day discussions of the scope of review are no longer dominated by the heat of partisan controversy…"[35] Both political parties of the time, Democrats and Republicans, ceded

[33] (Republican Party Platform 1956)
[34] (Hess 2012, 6)
[35] (Schwartz 1955, 7)

the debate of the question of judicial deference to agencies to the courts. In this vacuum surrounding administrative agencies, the Court attempted to establish a method of deference, with limited success, through two avenues, the fact-law distinction and the rational-basis test.

The first avenue centered on the ambiguous language within the APA regarding the "fact" and "law" distinction. Although matters of fact can be understood as answering the question "what happened" and matters of law answer "what should happen" there are many questions that can best be termed as "mixed questions" that have elements of both. In theory, the fact-law distinction in the context of administrative law would allow judges to rely on the expertise of agencies in deciding the facts of a case, but would leave the ultimate decisions of law to judicial discretion. By taking a literal definition of the words "fact" and "law," the APA attempted create clear, separate categories for the acceptability of juridical deference. Judges using the fact-law distinction would not need to spend the time and resources necessary to recreate the facts of the case themselves by holding evidentiary hearings. Instead, they can accept the agency's account of what happened and save their limited time for determining questions of law, where they theoretically have a comparative advantage and an institutional requirement to do so.

In practice, the fact-law distinction did almost nothing to really limit when and how the courts deferred to agencies. Rather than force the courts to neatly divide issues of law that they could review and issues of fact that they could not, the Court instead chose a pragmatism-based approach the law-fact distinction. Kenneth Culp Davis notes in his extensive review on administrative law that "judges commonly tend to use the terms [law and fact] in their analytical sense but that at the same time judges usually tend to allocate functions between agencies and courts on the basis of practical concerns instead of on the basis of analysis of the words 'law' and

'fact'."[36] In other words, judges often used the term "fact" to describe issues that they felt agencies could better resolve based on their expertise while judges used the term "law" to instead refer to areas that judges felt comfortable substituting their own judgements for that of agencies. Rather than create a clear differentiation in reviewable actions based on matters of "fact" and "law" the APA instead induced courts merely to change the language of their decisions. This outcome to the fact-law distinction was anticipated prior to the passage of the APA by the report from the Attorney General's Committee on Administrative Procedure, which wrote that "what one judge regards as a question of fact another thinks is a question of law."[37]

This characteristic of the fact-law distinction, and its nature as a reaction to the statutes of the APA, meant that the Court's use of the distinction rested heavily on the elements of the particular cases and how willing each judge was to substitute judgement for that of the agencies. Rather than a comprehensible doctrine, the fact-law distinction was merely a reaction to the law-fact constraints the APA sought to impose, a way for the courts to avoid conflict with the law rather than to clarify when and how agencies should be afforded deference. In addition to the fact-law distinction, however, the Court also experimented with the "rational-basis" test regarding deference to agencies. The rational basis test approach to judicial deference had existed since at least the New Deal era[38] and was the Court's alternative to the difficulties of the fact-law distinction discussed above.

By using the rational basis test, the Court side-stepped the issues of the law-fact distinction and ignores that language in the APA entirely, instead choosing to focus on whether

[36] (Davis 1958, 193)
[37] (Attorney General's Committee on Administrative Procedure 1941, 90)
[38] See *Mississippi Valley Barge Lin CO v. U.S.*, 292 U.S. 282 (1934), which stated that "the judicial function is exhausted when there is found to be rational basis for the conclusions approved by the administrative body."

or not the agency acted in an "arbitrary or capricious manner."[39] This particular doctrine was exemplified by *Gray v. Powell*, in which Justice Jackson concluded that the courts have fulfilled their role in reviewing the rulemaking of agencies if they find that the agency acted in a "just and reasoned manner."[40] In practice, this mean that if the reviewing court feels that there are several possible, competing interpretations of a statute, it will defer to the agency's interpretation as long as that interpretation is reasonable. This doctrine, which reflected elements of *Skidmore*'s "validity of reasoning" criterion, was used in a large number of cases to justify deference to agencies. Although the use of this test avoided classifying an issue as law or fact, it was used in a highly inconsistent manner by the Court, which chose to apply it in a seemingly arbitrary manner without justification.[41] In cases that were substantially similar, the Court often chose to use the rational basis for one case and not the other, with no explanation for the lack consistency. Indeed, the only substantial difference between cases was often whether or not the Court agreed with the agency.[42] Rather than use *Gray v. Powell* as an opportunity to clearly demonstrate its approach to deference, the Court's decision in that case was limited and the application of this doctrine was left up to judicial discretion, leading to similar cases with different outcomes and no mention of whether or not the agency had a "rational basis" for its interpretation.[43]

The Court's experimentation with the rational basis test during this time resulted in two separate lines of case law. One line argued that courts should use the rational basis test in order to determine when to give proper deference to agencies. The other line suggests that it is entirely up to the discretion of the courts when to substitute their judgement for that of the agencies. The

[39] Administrative Procedure Act of 1946
[40] (Gray v. Powell 1941)
[41] (Schwartz 1955)
[42] (Davis, Administrative Law Treatise 1958, 223)
[43] See Davies Warehouse Co. v. Bowles, 321 U.S. 14 (1944)

division between these two case lines essentially meant that there was no prevailing formula for lower courts to look to for guidance when determining deference. Davis argues that "[…] we have two lines of cases, not a single line of cases, and […] we have no authoritative judicial explanation of what motivates the Supreme Court in choosing between the two lines in deciding any particular case."[44] Although the Supreme Court had succeeded in creating a variety of tools to deal with deference to administrative agencies under the APA, the courts were unwilling to uniformly apply judicial deference in a coherent manner for several decades

Strikingly, this unclear and ambiguous approach to deference continued throughout the 1960s with little or no change. Revisiting his 1958 treatise in 1970, Professor Davis writes that "no development during the twelve-year period calls for even the slightest change in analysis in Chapter 30 [of the 1958 treatise]."[45] The rational-basis test continued to be used inconsistently, in an on[46] and off[47] manner, for the duration of this period and the fact-law distinction continued to be as indistinct as before. Judicial deference was a matter of pure discretion by the judiciary. The Court's static approach to deference may, at least in part, be the result of the continued lack of pressure from the political regime. For almost the entirety of the 1960s, the Democratic Party controlled both houses of Congress and the Presidency. Without external political pressure, the Court was free to decide each individual cases based on other factors, including attitudinal and strategic influences. In this regard, it is not necessary to explore why the Court decided individual cases the way it did. Instead, it is important to note that the Court chose to decide these cases without implementing a standard test to create some uniformity in its decision

[44] (Davis 1958, 230)
[45] (Davis 1970, 1040)
[46] See U.S. v. Drum 368 U.S. 370 (1962), NLRB v. United Insurance Co. 390 U.S. 254 (1968)
[47] See American Ship Building Co. v. NLRB 380 U.S. 300 (1965), Commissioner v. Tellier 383 U.S. 687 (1966)

making. This period of stability, if not clarity, in the Court's approach to deference continued through the end of the New Deal era.

Political and Administrative Changes in the 1970s and Their Effects on Judicial Deference

If taken in isolation, the Court's long period of complacency in the 1950s and 1960s makes its decisions in the 1970s and 1980s and, ultimately, *Chevron* difficult to explain. Although Professor Davis accurately observes that the Court's own approach to agencies was unchanged during this time, it is just as important, if not more so, to look at the broader influences that were developing. During the period of time that Professor Davis saw no change in the Court's doctrine of deference, or lack thereof, the surrounding political environment beyond the Court was undergoing shift in its view towards administrative agencies, particularly within the Republican Party. Concurrently, the administrative concerns facing the judiciary regarding regulatory caseloads were also increasing dramatically. If the Court's legal view of judicial deference to agencies was relatively stagnant during the 1960s, the Republican Party's was undergoing a seismic shift that would come to form a major plank of the Republican platform for decades to come.

Where the Eisenhower era Republican Party of the 1950s had relied as heavily on agencies as the Democratic Party, the Republican Party of the 1960s had grown more suspicious and hostile towards agency regulation. 1968 Republican Party platform warned of "an entrenched, burgeoning bureaucracy [that] has increasingly usurped powers" and called for a "strict Congressional oversight of administrative and regulatory agency compliance with the letter and spirit of the law… [.]"[48] Although the Court was isolated in the shifts in the Republican

[48] (Republican Party Platform 1968)

Party platform due to the Democratic dominance of Congress and the presidency, the politics of the era were changing in a way that would soon force the Court to confront the issue of judicial deference to agencies directly. With the election of a Republican president in the 1968, the field of judicial deference to agencies, previously the sole domain of the courts, would become increasingly crowded by other political forces.

Just as importantly, the judiciary during this period of time also began to face serious administrative issues that arose from the increased pace of regulation. These administrative concerns came in two main forms. First, the sheer volume and complexity of agency cases increased dramatically over the 1970s. The judiciary as an institution has a basic responsibility to process cases and resolve them as quickly as possible. Like everything else, however, the judiciary is subject to time and resource constrains which limit its ability to function. These administrative constraints began rapidly expand during the 1970s. From 1970 to 1978, the number of cases filed with the U.S. Court of Appeals for the Ninth Circuit increased by almost 100 percent, with the number of judges on the bunch remaining constant.[49] By 1981, almost 15 percent of all cases filed with the courts of appeal were agency cases, with over half of those cases being concentrated in the U.S. Court of Appeals for the District of Columbia.[50] These massive increases to caseloads aggravated the administrative concerns about how the courts should handle the increase in case volume. On top of those concerns, Judge Patricia Wald, writing during that time period, notes that "a greater portion of [agency cases] present [complex and technical matters] now than they did 30 years ago…"[51] Judges are not specialists and the

[49] (Deane and Tehan 1981)
[50] (Administraive Office of the U.S. Courts 1981, 48-49)
[51] (Wald 1982)

ever increasing complexity of regulations requires that judges continue to defer to agencies on more than just issues of fact, if only because agencies apply their statutory directives every day.

The second administrative issue that developed at this time was one partially of the Court's own making. The Supreme Court provides guidance to the lower courts in its judgements, helping to create a predictable and standardizes judicial process throughout the federal court system. In the period before *Chevron*, as discussed above, this was clearly not the case. During the 1970s, Levin notes that "opposing interest groups seeking review of rulemaking proceedings often engage[d] in a frantic 'race to the courthouse,' each striving to secure a forum it considers favorable."[52] Because of the Supreme Court's haphazard approach to judicial deference in the past, there was an uneven and highly discretional application of judicial deference in the lower courts. Some courts relied more on the judicial deference line of cases when deciding agency cases while other relied more on the judicial judgement substitution line of cases. Opponents of agency action would often "forum shop" and bring their case before courts that seemed more sympathetic and less likely to defer to agency interpretations. This "forum shopping" was an issue of increasing concern in the judiciary and the wider legal intellectual environment at the time.[53] Without a consistent, national standard for judicial review, "forum shopping" in the courts became an increasingly serious concern.

These outside administrative pressures helped catalyze the Court's approach to judicial deference in two important ways. First, the Court, forced to confront the question of deference, had to decide between the two lines of cases it had created. Although Justice Scalia, looking back at the *Chevron* case, would later say that "*Chevron*... essentially chose between these two

[52] (Levin 1979, 597)
[53] (Harvard Law Review Association 1980)

conflicting lines of decision."[54] The Burger Court, while often cited as a period of transition from the New Deal era to a more conservative political era,[55] was a period of administrative modernization for the courts. Although Chief Justice Burger was not known for elaborate legal theories and intellectual leadership on the Court, he has been cited as innovating how the courts approached their increasing workloads.[56] This administrative focus is consistent with an increased commitment to judicial deference by the Burger Court. Bernard Schwartz notes that "the [Burger] Court has consistently reiterated the theme of deference to administrative interpretations."[57] The fact that Professor Schwartz himself noted this change in consistency is particularly striking given that he had decades earlier noted the inconsistent application of deference under the Warren Court.[58] Case by case, the building blocks that would form the foundation of a more coherent and national judicial deference doctrine in *Chevron* were laid. The increased attention to judicial deference, through legislation and case decisions, also generated a surfeit of academic thought on the subject of deference focused on the administrative benefits and necessity of judicial deference in the modern administrative state. By consistently highlighting the administrative aspects of judicial deference, the debate around the doctrine was shaped in the realm of policy and administration.

One of the earliest Supreme Court administrative law cases of the 1970s was *United States v. City of Chicago* (1970). Significantly in this case, the Court, finding a section of the Interstate Commerce Act ambiguous, gave deference to "the administrative agency given

[54] (Scalia 1989, 513)
[55] See Dennis J. Hutchinson, A *Transitional Chief Justice With a Contradictory Record*, National Law Journal., July 10, 1995
[56] (Tobias 1996)
[57] (Schwartz 1980, 391)
[58] See "*Gray vs. Powell* and the Scope of Review", *supra*

oversight of the problem."[59] Deference, in this particular case, was not granted with the justification of agency expertise or on the "rational-basis" test. It was instead granted by appealing to the ambiguity of the statute, a concept that would later form the first step of *Chevron*'s two-step process. Although there were two dissenters in this decision, Justices Black and Harlan, a case in the subsequent year, *Griggs v. Duke* (1971) would unanimously grant "great deference" to the Equal Employment Opportunity Commission with a citation to *United States v. Chicago*.

There was also a growing recognition in the judiciary that the Supreme Court's two differing case lines on judicial deference were becoming irreconcilable and problematic with the increase in regulatory cases. In 1975, appellate court Judge Henry Friendly, foreshadowing the choice that the Supreme Court would have to make in this new political era, wrote that "We think it is time to recognize… that there are two lines of Supreme Court decisions on this subject which are analytically in conflict…."[60] Awareness of this growing problem had entered the awareness of the judiciary and was beginning to appear in case law. The 1970s and 1980s were a time of recognition for the Supreme Court that it would need to choose which line of judicial deference cases to apply its. The existence of two separate lines of decisions had become an increasingly large concern and was no longer just an intellectual nuisance for administrative law experts. With a rise in the number of cases related to complex administrative actions and the rise in "forum shopping," a clear approach to judicial deference was needed.

The Court of the 1970s, beyond cases related to the particular area of judicial deference to agency statutory interpretation, also began to display an increasingly permissive attitude

[59] (United States v. City of Chicago 1970)
[60] (Pittston Stevedoring Corp. v. Dellaventura 1976)

towards agencies in other areas of law. *Vermont Yankee v. NRDC* is one such case dealing with the autonomy of administrative agencies and the Court's role in reviewing agency regulations. Justice Rehnquist, speaking on behalf of a unanimous Court, wrote that "[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons… not simply because the court is unhappy with the result reached."[61] Under *Vermont Yankee,* courts would be unable to impose additional regulations on agencies beyond those that are already required by Congress. This would limit the opportunities for judicial substitution in the future and increase agency autonomy from certain judicial constraints. The unanimous nature of the decision, and the fact that the author of the Court's opinion, Justice Rehnquist, was a Nixon appointee known for his conservative politics, suggests that there were broader forces at work in this decision than just the attitudinal alignments of the justices. By deciding not to impose additional regulations in *Vermont Yankee*, the Court was essentially deferring the Nuclear Regulatory Commission's expertise on the complex issue of nuclear safety requirements.

The decision in *Vermont Yankee* did not go unnoticed and sparked a range of academic discussions on the role of courts in reviewing agencies. Some articles analyzing *Vermont Yankee* soon after the decision, such as Professor Richard Stewart's discussion,[62] argued that the Court was incorrect in its decision making and should have instead left the agency procedural requirements open to judicial substitution. Another line of academic thought, however, supported the Court's increasingly hands-off approach to agencies. Professor Clark Byse argued in a direct rebuttal to Stewart that the decision was correct in its entirety and that courts should generally

[61] (Vermont Yankee v. NRDC 1978)
[62] (Stewart 1978)

avoid "inappropriate judicial intrusion into the day-to-day deployment of agency resources..."[63] when deciding cases of agency autonomy. Although the political environment may have become more suspicious towards agencies, there was still considerable intellectual support for deference and for limiting judicial policy substitution on administrative ground. Then-professor Stephen Breyer took an even stronger stance than Byre on the issues of deference involved in *Vermont Yankee*, writing that "my only disagreement…[with] the Supreme Court is… that a stringent standard of review is excessive…[and] the judges are… intruding too deeply upon the administrative process[.]"[64] Much of the literature about judicial deference focused on the administrative aspects of the doctrine, often citing how the judiciary, as generalists, do not have the same level as expertise as administrative agencies.

Towards the end of the 1970s, the Court began to abandon parts of its approach to deference that limited when it would defer to agencies. One of these abandoned components was how consistent an agency's interpretation of statute was with "with earlier and later pronouncements" of statutory interpretation. In this view of deference, the consistency of an agency's interpretation of statute was critical to understanding the "one, true" meaning of the statute in question. If the agency held the same interpretation for a long period of time, it was more likely to "know" what Congress had originally intended. If it varied its interpretation of statute, then it was far less likely to understand or advance the original intent of the statute.

Andrus v. Sierra Club (1979) represented a narrow, but real, retreat from this principle. Justice Brennan, writing on behalf of a unanimous Court, argued that "the interpretation of [the National Environmental Policy Act of 1969] by the Council on Environmental Quality (CEQ)

[63] (Byse 1978)
[64] (Breyer 1978)

under its current mandatory regulations is entitled to substantial deference even though the regulations reverse CEQ's interpretation under earlier advisory guidelines…."[65] Although the Court justified this particular departure by highlighting the fact that the CEQ was changing advisory guidelines to mandatory regulations, the Court was, crucially, approaching interpretive consistency from a different angle than it had previously. Justice Scalia would later argue in 1989 that the "consistency of pronouncement" approach "makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to the accomplishment of statutory purpose."[66] Rather than looking to consistency to find the "correct" interpretation of statute in *Andrus*, the Court instead deferred to the agency on whether or not its new interpretation of the statute was the best approach to its current demands, in this case whether the agency's new interpretation provided the best approach to creating new, mandatory regulations.

Conclusion

The beginnings of the judicial deference doctrine that led to *Chevron* were fraught with inconsistency and a general lack of attention by the courts. When it suited judges to appeal to judicial deference on cases where they supported the agency's decisions, they did so. When they did not agree with agencies, however, judges often did not even mention judicial deference. Agencies were not generally presumed to be given deference. Neither the judiciary not the other branches of government were particularly focused on judicial deference immediately after the passage of the APA. With neither party particularly concerned about deference, and absent other pressures, the Court often decided agency cases based on whether or not it agreed with the

[65] (Andrus v. Sierra Club 1979)
[66] (Scalia 1989, 517)

agency, using deference after the fact only to justify its agreement. Judicial deference to agencies, and the scope of review in general, was not been clear or straightforward for this large portion of the Court's history. This period of conflicting judicial pronouncements on deference, lasting for almost 20 years, was followed by a sudden and consistent commitment to strong deference. Changes in the administrative challenges faced by the judiciary during the 1970s proved key to pressuring the Court into choosing between the two irreconcilable lines of cases on judicial deference. To defer or not defer was the question of the time for the judiciary. Administrative necessity, rather than the attitudes of any particular justices, compelled the Court to consider new ways to stem the tide of increasingly complex agency regulatory cases, one of which was through an increased judicial deference. The previous system of judicial deference to agencies, or rather the lack of one, proved inadequate to address the new needs of the courts under the administrative state.

The transition from chaotic use of judicial deference in the 1950s and 1960s was one of the ways the Court sought to cope with increased caseloads and with increased divisions in the lower court which led to "forum shopping." Indeed, some of the previous methods of deciding deference, such as the fact-law distinction, were unworkable in a practical sense, as they left too much up to the discretion of individual judges and relied on shifting definitions of the words. Although these issues had been tolerable when before the large proliferation in administrative rule making, they quickly began to consume much time and resources as agency cases ballooned almost out of control within a relatively short time. The Court during the 1970s was on its own trajectory towards judicial deference, one that resulted in stronger and more consistent deference to agencies on a variety of issues.

Chapter 3: The Bumpers on the Road to *Chevron* and the Judicial Deference in the *Chevron* Heyday

The Court's push towards judicial deference, while primarily an administrative concern in the judiciary, became a political and policy concern in the other branches of government. The courts do not exist in a vacuum, especially in areas of overlapping power like administrative law. In order to understand the course of *Chevron* it is important not only to recognize why the Court began its push towards judicial deference, but also to examine why it was allowed to do so in a time of increasing skepticism of agencies. To understand this, it is necessary to explore the surrounding political environment. With the start of the Reagan Administration, deregulating the economy and reducing the power of administrative agencies became major issue snot only in the executive branch, but also within Congress. In particular, there was an uncharacteristically energetic debate about the desirability of judicial deference to administrative agencies involving the Bumpers Amendment. Although these pressures had been building within the Republican Party, there was also widespread support for the elimination of judicial deference across party lines. As the courts continued their trajectory towards increased deference, compelled by administrative and caseload concerns, politicians from both sides of the aisle became increasingly concerned by what they saw as an excessive, enabling amount of deference from the courts. Ironically, however, it may have been that election of Ronald Reagan and the executive-oriented approach to deregulation that saved judicial deference and allowed for its expansion in *Chevron*.

The ultimate failure of Congress to pass legislation limiting judicial deference can be explained by the way that the issue of deference cut across existing party lines. Although strong political regimes can influence Supreme Court decisions, the ruling political regime is often weak or unfocused on specific policy areas. Mark Graber argues that, when these areas of

weakness arise in political debate, Congress defers to the courts in deciding the outcome.[67] If divisions within both major political parties on a particular issue are great, then party leaders tend to let the judiciary decide the issue, rather than Congress, in order to avoid debate on the issue and lower its political salience. Importantly, Gruber also suggests that "legislative deference at times need consist of little more than refusing to restrain justices already committed to settling a particular political controversy."[68] In other words, Congress often recognizes when the courts seem to be on a trajectory to solve a particular political issue. When that happens, the decision facing Congress is whether or not to allow the courts to reach their terminus. A divided Congress can avoid a politically contentious issue simply by choosing to do nothing. This type of tacit legislative deference to the judiciary is important to understanding the debate on judicial deference and the so-called Bumpers Amendment just before *Chevron* and, through that, the decision of *Chevron* itself.

Bumpers in the Pre-Reagan Era

One of the most significant debates about judicial deference after the APA and prior to *Chevron* centered around the Bumpers Amendment, named for Senator Dale Bumpers (D-AR). As the Court's preference towards using deference as an administrative tool to help control caseloads became clearer, Congress began serious debate into potentially limiting judicial deference to agencies as part of a wider discussion on limiting agency regulations and power. The Bumpers Amendment to the Administrative Procedure Act, proposed three times in three consecutive congresses by Senator Bumper, sought to impose changes to the APA that would limit how and when the courts deferred to agencies. Although the language in the bill changed

[67] (Graber 1993)
[68] *Ibid*, 41

substantially with each of its three introductions, perhaps a reflection of the complexities and confusion surrounding judicial deference, the third, 1979 version of the Bumper Amendment directed courts to increase their review of administrative agency regulation and stated that "there shall be no presumption that any rule or regulation of any agency is valid and… the [reviewing] court shall not uphold the validity of such challenged rule or regulation…[without] a preponderance of evidence."[69] The bill also included provisions that precluded the courts from showing any deference to agencies on questions of law, such as statutory interpretation. As in the past, however, critics of the Bumpers Amendment noted that the fact-law distinction was tenuous at best and practically non-existent at worst.[70] The Bumpers Amendment generated a significant amount of controversy and elevated the issue of judicial deference into a realm of greater national discussion.[71]

The third version of the Bumpers Amendment passed the Senate unanimously in 1979 and received bipartisan co-sponsorship from a diverse group of four senators, two Democrats and two Republican, including Republican senator and former presidential nominee Barry Goldwater (R-AZ), who famously warned that the administrative state was becoming "a vast national authority out of touch with the people, and out of their control."[72] The ideological variation in supporters of the Bumpers Amendment, championed by a liberal Democrat and a conservative Republican, presents a strange puzzle for judicial deference. Senator Bumpers, in a speech supporting the bill, declared that "Citizen groups of all kinds… are unanimous in explaining that… regulations issued by the executive or administrative agencies [have] become too

[69] S.111, 96th Congress (1979)
[70] (Levin 1979)
[71] See *e.g.* Robinson, Timothy, "Lawyers, Judges Rub Elbows Socially.", The Washington Post, June 9, 190, discussing the fourth version of the Bumpers Amendment, termed "Baby Bumpers"
[72] (Goldwater 1960, 6)

intrusive…[.]"[73] It is unclear, however, what exactly Congress intended by the language of the amendment. A report submitted to the Administrative Conference of the United States, authored by Ronald Levin, illustrated the myriad ambiguities the text of the Bumpers Amendment and argued that these ambiguities made passing the amendment inadvisable.[74] In fact, Levin notes that "some [remarks in support of the bill] in the legislative history [of the bill] seem drastically at odd with the text of the statute itself."[75]

Beyond the ambiguities of the text of the statute itself, it is important to note that the Bumpers Amendment was formulated and first proposed during the Carter Administration. Administrative agencies during the Carter years were headed by proponents of strong economic regulation,[76] putting the administration at odds with other political actors in Congress who sought to deregulate the economy. It is possible that without strong executive action to deregulate and reduce agency regulations, the political pressures for deregulation were channeled into Congress. Rather than attempt to limit regulatory power through increase statutory specificity, which would be difficult under any circumstances, forcing the courts to abandon deference to agencies through the Bumpers Amendment was a simpler and easier way to demonstrate a commitment to reducing agency power. Perhaps unsurprisingly, the Bumpers Amendment was opposed by the Carter administration.[77] Although the Bumpers Amendment was reintroduced to Congress numerous times, the final death knell for the bill, the last bump on the road to *Chevron*, was not any sort of positive change in attitudes towards regulation. Rather, the election of a president dedicated to deregulation in 1980 provided an alternative path to

[73] 125 Congressional Record at S414
[74] (Levin 1979)
[75] *Ibid*, 567
[76] (Anderson 1991)
[77] *Ibid*

restricting agency regulations that not only rendered the Bumper amendment, with all its problems, not only unnecessary but also counterproductive.

The Reagan Administration and Judicial Deference

The Reagan Administration, famous for its vocal hostility to administration agency regulation, seemed to be supportive of the Bumpers Amendment at first. In line with the previous Republican Party platforms, the 1980 platform that Reagan ran on included, as a core plank, a stated recognition that "there are dangers inherent in the rapid growth of the federal bureaucracy, especially the arbitrary nature of its discretionary power and the abuses of procedural safeguards" and that this trend was exacerbated by over-delegation of power from Congress.[78] It is important to note that the focus of this particular plank lay on the role of the executive and of Congress in determining and limiting the scope of administrative agencies. It is worth noting that the platform plank involving the judiciary was significantly shorter in both length and attention to detail than the plank involving administrative agencies and Congress. Focus on deregulation was directed, generally, at Congress and the executive than at the courts.

Although the Reagan Administration verbally committed support for reducing the "size and scope of the executive Branch," the actual actions of the Administration differed from this promise significantly and ultimately set the stage for *Chevron* by dividing Congressional opinions on judicial deference to agencies and by creating an even larger amount of case work by accelerating controversial deregulations. This particular paradox of the Reagan era approach to agencies, that the Administration sought to weaken regulation by empowering the regulators, was highlighted by the response from Reagan's attorney general, William French Smith, to the

[78] (Republican Party Platform 2016)

Court's decision in *INS v. Chadha*.[79] Although the case itself dealt with the implementation of a legislative veto and with executive discretion, which is not entirely the same as deference to agencies or even agency autonomy, Smith signaled a possible openness to deference, in his defense of the decision from criticisms that it would cause executive overreach, saying "if [the decision in *INS v. Chadha*] encourages Congress to exercise greater restrain when it delegates power to administrative agencies, that is not a loss to the President… it is as inappropriate and unworkable for… the judiciary to do Congress's job…"[80] Smith's line of reasoning suggests that it is Congress that ought to be clear when it delegates power to agencies to enunciate the specific limitations to that delegated power. If Congress did not like the way that agencies were interpreting their statutes, Smith argued Congress should "overturn bad regulations with proper legislation." The general political atmosphere supported deregulation through the executive, Reagan Administration, rather than directly through the courts. Indeed, it appears that, at least in *Chadha*, the Reagan Administration used the decision as a way to further secure its executive focused method of deregulation from the Congress.

The Reagan Administration encouraged this approach to deregulation in the context of judicial deference to agency statutory interpretation. The fourth iteration of the Bumpers Amendment, introduced in 1981, reignited debate about whether or not Congress should force an end to the courts' growing deference. This version of the Bumpers Amendment was far more limited in its scope than the previous versions of the amendment, merely calling for "substantial evidence" instead of a the "preponderance of evidence" in the previous versions.[81] Although the goals of the Bumpers Amendment, eliminating deference to agency statutory interpretation and,

[79] (Immigration and Naturalization Service v. Chadha 1983)
[80] (Smith 1983)
[81] (Robinson 1980)

therefore, weakening the regulatory power of agencies, would seem to be in line with the goals of Reagan era deregulation, the new amendment became a cause of increasing concern in the new administration as time went on.

Bumpers in the Reagan Era

The Bumpers Amendment of 1981 was the final time the statute was proposed, ultimately dying when the House failed to vote on the bill. Examining the hearings on the Regulatory Procedures Act of 1981,[82] which the Bumpers Amendment was attached to, illustrates the political, intra-party fractures that developed during the start of the Reagan Administration. These cracks, which represent divergent views of how exactly the economy should be deregulated, help explain why Congress failed to, or perhaps decided not to, interfere with the courts' developing doctrine of increased judicial deference. In line with Graber's theory of legislative deference to the judiciary, Congress may have decided to merely defer to the judiciary on the matter of judicial deference to administrative agencies, choosing a hands-off approach and allowing the courts to reach their own decision regarding deference in *Chevron*.

Although Republicans, and many Democrats, at the start of the Reagan Administration supported the Bumpers Amendment on deregulatory grounds, divisions in the Republican camp began to appear soon after Reagan's election. Some politicians sought to limit regulations by limiting the power of administrative agencies to interpret their own statutory directives. This approach, which was embodied by the Bumpers Amendment, would have reduced the power and flexibility of the agencies themselves and made difficult the implementation of new regulations by forcing courts to engage in a "closer look" at Congressional intent in statutes. Critics of this

[82] Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, Regulatory Procedures Act of 1981, H.R. 746, Serial No. 27 (1981)

approach argue that it also restricts agencies from potentially deregulating. In the first year of the Reagan Administration, Frank Swain, general counsel for the Federation of Independent Businesses, voiced his concern that the Bumpers Amendment, if passed, would be "a double-edged sword for the Reagan people."[83] Deregulation often involves a reinterpretation of statute in order to justify why deregulation is permissible. If agency regulation was, previously, compelled by statute, then the removal of that same regulation is difficult to justify without reinterpreting the original statute.[84] As noted in the previous chapter, consistency of agency "pronouncement" was an important factor that the courts considered when trying to discern the true Congressional intent behind statute. Although this may not have been a concern under the relatively regulation friendly Carter administration, the heightened level of deregulation under Reagan brought the courts into conflict with agencies attempting to deregulation.[85]

This criticism did not go unacknowledged during the debate over Bumpers and became a major concern of opponents of the amendment. The elimination of judicial deference experienced significant opposition from the intellectual legal community. During a hearing on the Regulatory Procedure Act of 1981, Mark Rosenberg, chairman of the Select Committee on Regulatory Reform for the Federal Bar Association, argued that "[deregulation] could, however, be hampered severely in some areas if this provision makes courts less able to defer to agency judgements" and that "…this amendment could actually hamper the deregulation and fine-tune effort which… many people in Congress support."[86] Even within the Republican members of Congress, there was a divide over the Bumpers Amendment. Congressman Ed Bethune, a

[83] (The Reagan Administration: How Will Lawyers Fare 1981, 23)
[84] (Garland 1985)
[85] See *e.g.* Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983)
[86] (Regulatory Procedures Act of 1981: Hearings Before the Subcommittee on Administrative Law and Government Relations 1981)

Republican from Arkansas, expressed his opposition to the Bumpers Amendment, arguing that rather than pass the amendment "Congress can and must limit the scope of [agencies'] areas of responsibility to specific areas…[and] we have to stop playing games with the process and begin to concentrate on the substance."[87] Even ardent supports of the bill acknowledged that the Bumpers Amendment could hamper deregulation efforts, with Congressman Robert McClory, who sponsored the Bumpers Amendment in the House, admitting that "I can't help but agree that [the Bumpers Amendment] would complicated our task [of deregulation]."[88]

Within the Democratic Party, there were similar divisions about the Bumpers Amendment. Senator Bumpers himself was a Democrat and other members of the party supported his proposal, with Congressman Don Pease (D-OH) submitting a statement in support of the amendment. Other Democrats, John Conyers (D-MI) and Robert Drinan (D-MA) opposed the bill, saying "this amendment is unwise and unnecessary."[89] Both parties experience divides on the issue of judicial deference to agencies. These divides could not be easily reconciled, if at all. Passing Bumpers, and eliminating judicial deference, would have been antithetical to the executive focused deregulation that depended upon deference. In examining why the Bumpers Amendment and Congressional efforts to restrict judicial deference failed, it is important to look beyond just the opinion in Congress and to take a look at the growing dissatisfaction in the White House with limited deference.

Although the Bumpers Amendment was part of a larger effort to engage in deregulation, the newly elected Reagan Administration quickly soured on the idea of eliminating judicial deference. McClory recognized that, by May of 1981, the Reagan Administration was

[87] *Ibid.*
[88] *Ibid.* at 274
[89] *Ibid.*at 70

experiencing "second thoughts about the Bumpers Amendment."[90] During that same hearing, Edward C. Schmults, the deputy attorney-general under Reagan, expressed his concern that "an agency should be accorded some deference as to the meaning of its own regulations."[91] By this time, the Reagan Administration was beginning to publicly express its dissatisfaction with forcing the courts to review agency regulations *de novo*, without deference. By October of 1981, opposition to the Bumpers Amendment had become prevalent within the Reagan Administration.

Opposition to the Bumpers Amendment in the administration began to grow once it became clear that the amendment was a double-edged sword. The elimination of judicial deference that could hamper the introduction of new regulations could also impede the elimination of old ones. In a briefing to President Reagan prepared in advance of a meeting between Senator Bumpers and the President, Reagan's legislative assistant, Max Friedersdorf, expressed concern that the Bumpers Amendment, if passed, would "make it easier for this Administration's opponents to challenge deregulation in the courts."[92] The Reagan Administration was worried that reduced deference would not only complicate efforts to deregulate, but would also to provide opponents of deregulation a new channel through which to combat the Reagan administration. Friedersdorf also noted, to help explain the possible anti-regulatory effects of the amendment, that "the amendment was developed some time ago to make it easier for the business community to challenge Carter Administration regulations."[93]

This explanation for the Bumpers Amendment illustrates that the amendment was seen, at least in part, by the Reagan Administration as an artifact of the previous Carter Administration

[90] *Ibid*, 864.
[91] *Ibid,* 755.
[92] Brief, Max Friedersdorf to Ronald Reagan, Oct 6, 1981, folder "10/07/1981," Box 7, Ronald Reagan Library
[93] *Ibid*

and no longer necessary under the new administration. In this view, the Bumpers Amendment may have made sense when the executive was committed to maintaining a strong regulatory scheme, but the presence of an executive dedicated to deregulation made the amendment more of a liability than an asset. After all, an agency's previous interpretation of its statute was regarded as a way to determine Congressional intent and deregulatory actions often involved reinterpretation of statute.[94] Reagan's talking points for the meeting with Senator Bumpers stressed a need to "make sure our deregulatory efforts are not thwarted by an ambiguous interpretation of [his amendment]." However, the "ambiguous interpretation" of the Bumpers Amendment, which allowed for it to be interpreted in many different ways, was one of the ways that supporters of the amendment hoped to collect enough votes for passage. Representative Danielson, in the earlier hearings on the Regulatory Procedures Act, expressed his belief that "Bumpers was sufficiently vague so that… we could get those votes which are nailed to the mast of Bumpers."[95] The vagueness that concerned the Reagan Administration was, like in many Congressional statutes, important in getting sufficient votes.

The Reagan administration's stance towards Bumpers was representative of its larger view towards judicial deference. In cases such as the *State Farm* (1981) case cited above, the Administration argued that there was a need for more judicial deference, not less, in the areas undergoing deregulation. In particular, Rex E. Lee, the solicitor general under Reagan, argued in *State Farm* that "a court must be extremely reluctant under the APA to set aside an agency's decision to rescind a regulation that was not required by its authorizing statute, irrespective of

[94] See *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983), where the Supreme Court decides not to give deference to a new, deregulatory interpretation of statute, instead declaring the new interpretation "arbitrary and capricious"

[95] (Regulatory Procedures Act of 1981: Hearings Before the Subcommittee on Administrative Law and Government Relations 1981, 765)

whatever standard of reasonableness is applicable to the promulgation of the regulation."[96] Although the Court voted unanimously against the Reagan Administration's attempt to rescind regulations in *State Farm*, the Administration continued to argue that judicial deference was necessary to promote deregulation. This executive preference for judicial deference proved not only important in defeating the Bumpers Amendment, but also in influencing the Court's decision in *Chevron v. NRDC* and providing the foundations for strong judicial deference to agency statutory interpretation.

Chevron v. NRDC

The decision of *Chevron* was made with an irregular voting panel of justices. Two of the most conservative members of the Court, Justice Rehnquist and Justice O'Connor, were both absent from the decision, along with Justice Thurgood Marshall, who was sick at the time of the decision. At issue was whether or not the Environmental Protection Agency (EPA) was able to reinterpret the meaning of the statutory term "source," referring to sources of air pollution. The Court voted to defer to the EPA's interpretation of the Clean Air Act. It has often been noted that the *Chevron* decision was not seen as a landmark by the Supreme Court when being written, rather it was just a restatement of the Court's previous standard of deference in a new way.[97] That *Chevron* drew upon previously decided standards for deference certainly true given that the two-steps of the "two-step" process of *Chevron*, ambiguity of Congressional statute and reasonableness of the agency interpretation, appeared, as discussed above, in Supreme Court decision throughout the 1970s. But even if *Chevron* was just a condensation of previous case law, it is no coincidence that the case occurred only a few years after the end of the Bumpers

[96] (Motor Vehicle Manufatorers Association v. State Farm Mutual Automobile Insurance 1983)
[97] (Merill 2014)

Amendment and Congress's attempt to restrict judicial deference. *Chevron* marked conclusively that the Court had chosen the judicial deference to agencies line of cases over the judgement substitution line of cases. Although the Court had already been favoring judicial deference in order to control caseloads for many years, *Chevron* was the definitive next step in that trend.

The influences of the Reagan Administration, which had long pushed for judicial deference to agencies, are apparent throughout the case. Justice Stevens wrote in the *Chevron* decision that "judges…are not part of either political branch of the Government…[and] while agencies are not directly accountable to the people, the Chief executive is…"[98] Although a novel innovation on Justice Stevens's part, one that Thomas Merrill argues "broke new ground…as a reason for deferring to agency interpretations,"[99] this idea parallels with William French Smith's defense of *INS v. Chadha*. This justification for the *Chevron* decision shifted the issue of regulatory change to the executive and follows in line with the desires of the Reagan Administration as articulated by Smith. Under *Chevron*, if the Congress wanted to overturn bad regulations, it could do so with legislation clarifying its original intent. Otherwise, it would be up to the discretion of the administrative agency to interpret its statutory directive as it saw fit for regulatory purposes.

The Reagan Administration's arguments during the case were also clearly reflected in the final outcome of the decision. One of the core holdings of the *Chevron* case was that judicial deference could apply merely when the statute was silent on the issue and that it was not necessary that there be an explicit grant to discretion to the agency. Paul Bator, the deputy solicitor general under Reagan, argued in the oral argument that the EPA's discretion in

[98] (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 1984)
[99] (Merill 2014)

interpreting the Clean Air Act could only be eliminated by "positive law," a clear statement by Congress forbidding a particular interpretation. The Solicitor General's brief similarly emphasized the "implied delegation" of interpretative power from Congress to the EPA in the Clean Air Act.[100] That these arguments appeared in the final *Chevron* decision indicates that the Court was convinced by the Reagan Administration's arguments for increased judicial deference. The relatively wide ruling of *Chevron* had far-reaching effects, not the least because many congressional statutes have vague and ambiguous provisions in an attempt to collect the votes necessary to pass.

Chevron presented a clear application of judicial deference in the context of deregulation, allowing the EPA to reinterpret the Clean Air Act in a way that lessened the regulatory burdens on pollution producing factories. Judicial deference to agency statutory interpretation was not just a liberal construct to allow agencies to impose regulations beyond the intention of Congress, as it had been viewed during the Carter Administration. Instead, it could be used as a tool to justify increasing and sudden agency deregulation. Under the previous "consistency of interpretation" criterion, agencies would have difficulty attaining judicial deference if it tried to remove a long standing regulation it had previously said was statutorily required. *Chevron* solidified a place for deference under a conservative political regime. The decision in *Chevron* was in many ways what the Reagan Administration had already been pushing for when it began to oppose the Bumpers Amendment. Under an Administration that sought to engage in deregulation through the office of the President, deference to more narrow interpretations of Congressional statues by agencies would be a tool too valuable to eliminate in the name of

[100] (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 1984)

separation of powers, as Bumpers sought to do, particularly when a conservative sat in the White House.

Creating the Chevron Doctrine from Chevron v. NRDC

Interestingly, *Chevron* was not initially seen as a particularly far-reaching case and certainly not the landmark Supreme Court case it is today. Merrill notes that "*Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later."[101] For all the controversy surrounding the Bumpers Amendment in 1981, concerns about judicial deference to agencies had evaporated by the time *Chevron* was decided in 1984. This silence is perhaps the clearest indicator of how thoroughly the debate had subsided in Congress. Concerns in Congress about executive overreach facilitated by judicial deference had given way to a tacit acceptance of agency interpretive power. Despite the previous intensive scrutiny of judicial deference, the decision in *Chevron* was accepted without so much as a second glance when it was first decided. Although the *Chevron* decision may not have been noticed much in the legislative branch, its uptake in both the executive and judicial branches demonstrates the extent to which *Chevron* was important to those two branches.

Support for the newly minted *Chevron* doctrine by executive lawyers helped transform the case into a landmark. Merrill argues that "*Chevron* was regarded as a godsend by executive Branch lawyers… who push relentlessly[102] to capitalize on the perceived advantages the decision presented." Given the emphasis that the Reagan Administration had placed on judicial deference even before *Chevron*, advocacy for *Chevron* by executive lawyers is not surprising. What this does highlight, however, is the contrast between reactions from the legislative and executive

[101] (Merill 2014)
[102] *Ibid.*

branches. Where Congress was silent, the executive was quick to make noise in supporting *Chevron*. Judicial deference was critical to executive-oriented deregulation, and the executive branch seized on *Chevron* as an opportunity to incorporate strong judicial deference into existing judicial canon. *Chevron* provided a clear way for the executive to express its desire for deference from the courts. As a clear case providing a strong level of deference, lawyers beating the drum of *Chevron* forced the courts to acknowledge that they had an obligation to try and apply the *Chevron* doctrine in administrative law.

One of the single most significant things that President Reagan did to solidify the supremacy of *Chevron* was the appointment of Antonin Scalia to the Supreme Court. Scalia, who later became known as *Chevron*'s premier defender on the Court,[103] had previously participated in the hearings on the Bumpers Amendment. A prepared statement by then-professor Scalia argued that "[the attitude of supporters of the Bumpers Amendment] promises to do major harm to the drive for genuine regulatory reform."[104] Scalia's support for judicial deference had existed before *Chevron* and was made quite public during the Bumpers Amendment. Interestingly, Scalia's support of judicial deference to agency statutory interpretation was apparently not of much concern during his Supreme Court confirmation hearing in 1986, with only a brief mention made in the testimony.[105] Although it is difficult to discern whether or not Scalia's evident support for judicial deference was a factor in his nomination, his ascension to associate justice was a boon for the doctrine. Just over a year after his appointment to the Supreme Court, Justice Scalia wrote a concurring opinion in *NLRB v. United Food & Commercial Workers* supporting *Chevron* deference, saying "our decision demonstrates the continuing and unchanged vitality of

[103] (Scalia 1989)
[104] (Regulatory Procedures Act of 1981: Hearings Before the Subcommittee on Administrative Law and Government Relations 1981, 109)
[105] (NLRB v. Food & Commercial Workers 1987)

the test for judicial review of agency determinations of law set forth in [*Chevron*]."[106] Scalia's enthusiastic support for *Chevron* pushed the Supreme Court to continually reaffirm its support for the doctrine

While appointing Scalia to associate justice helped maintain the doctrine in the Supreme Court, *Chevron* was especially influential as a guiding doctrine for the lowers courts. The *Chevron* decision was quickly accepted in the lower courts, particularly the D.C. Circuit, as a way of handling cases involving complex agency rulemaking.[107] A later study of *Chevron* applications in the circuit courts found that "in *Chevron*, the Supreme Court has an effective tool to supervise lower courts' review of agency statutory interpretations."[108] In theory, if not always in practice, *Chevron* would help create more predictable legal outcomes by inducing reviewing courts to substitute their judgement for that of the agencies less often. Acceptance of *Chevron* in the lower courts made *Chevron* increasingly important as a decision.

For almost two decades after the *Chevron* decision, the scope of the doctrine remained mostly consistent. With the exception of *Lechmere v. NLRB*[109], which held that *Chevron* deference does not supersede Supreme Court precedent, the question surrounding the doctrine was not how it should be applied and to what regulations, but when to apply it. Cases that suggested limiting the scope of *Chevron*[110] were abandoned before they could gain traction in limiting the doctrine. Despite the anti-judicial deference pressures in Congress that had preceded *Chevron*, strong judicial deference to agencies had established itself as the foremost approach to administrative law cases.

[106] *Ibid.*
[107] (Merill 2014)
[108] (Barnett and Walker 2017)
[109] (Lechmere, Inc. v. National Labor Relations Board 1992)
[110] See, e.g. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)

Conclusion

The political path to *Chevron* illustrates the tension between the Supreme Court and other government institutions. Many members of Congress pressed for the Bumpers Amendment as one practical avenue of limiting agency regulatory power. This would have created a court-centric barrier to regulation, although barriers to deregulation would have increased as well. With the election of Ronald Reagan to the White House, an alternative pathway of deregulation focused on executive action and agency appointment opened up that was irreconcilable with the elimination of deference. With Congress increasingly split between these two camps and the Reagan Administration pushing against deference limitations, the issue was left to the courts. *Chevron* was not a decision at odds with the deregulatory spirit of the time. It was instead the product of a conflict between two competing theories of regulatory limitation. The Reagan Administration encouraged decisions like *Chevron* because it felt that in order to shrink the regulatory impact of agencies, it needed to grow the discretionary powers of the agencies. Through executive lawyers and Supreme Court appointments, *Chevron* the doctrine was a product of the political preferences of the executive, even if *Chevron* the case was driven by other, administrative concerns.

It is important to note, however, that "legislative deference to the judiciary may not reduce the intensity of public debate over a crosscutting issue in the long run."[111] Although Reagan-era deregulation released the immediate tension surrounding judicial deference to agencies, the concern over the scope of deference was not eliminated. Although the salience of judicial deference may have faded for a time, the issue itself was never completely resolved.

[111] (Graber 1993, 42)

Chapter 4: *Chevron* in Flux and the Future of the Doctrine

Dissenting over the major changes to the *Chevron* doctrine made in *U.S. v. Mead* (2001), Justice Scalia warned that "[w]e will be sorting out the consequences of the *Mead* doctrine… for years to come."[112] Although Justice Scalia's dissent was focused on how the Court would respond, the period of change initiated by *Mead* had ramification beyond just the judiciary, spreading throughout the other branches of government. The *Chevron* doctrine had helped resolve, or at least clarify, the Court's approach to judicial deference for a time, but the doctrine has undergone substantial change since 2000. Since then, the Supreme Court has made a number of rulings attempting to better define the full scope and limitations of the doctrine, both severely limiting when the doctrine can be applied[113] but also greatly expanding its influence in cases where it is applied.[114]

This chapter examines how the changing frame of judicial deference in the courts allowed conservatives in Congress to constitutionalize *Chevron*. By tracking the legal development of *Chevron* since 2000 and paying particular attention to how the framing of *Chevron* and judicial deference changed, it becomes clear that *Chevron* transitioned from an issue of administrative importance to one of constitutional importance. Each of the major cases raised either constitutional concern or else seemed to imply that it was ultimately Congress's responsibility to state the boundaries of judicial deference. These constitutional ideas are also reflected in the renewed debates surrounding *Chevron*, suggesting that the constitutional

[112] *Ibid.*
[113] See *U.S. v. Mead*
[114] See *Brand X* case

concerns raised in the judiciary and by legal academics has created a foundation for constitionalizing *Chevron* in the political branches.

These modifications to the *Chevron* doctrine were not successful in clarifying the extent of judicial deference and only muddied the issue further. These confusions opened the doctrine up to substantial criticism on a number of fronts, ranging from separation of powers issues to the practical difficulties of using a complex, multifaceted doctrine. While these changes have made the judicial application of the doctrine more difficult, they have created other avenues of criticism towards judicial deference that have helped unify critics of the doctrine. In the two most recent Congresses, there has been a resurgence in the debate over judicial deference, centered in part around the Separation of Powers Restoration Act (SOPRA), which would force the courts to consider issues of agency interpretation of statute *de novo*, without deference. Although the ultimate objective of SOPRA is the same as the Bumpers Amendment, the rationale for SOPRA differs significantly from Bumpers.

This most recent debate around judicial deference, with a particular focus on *Chevron*, illustrates how issues like judicial deference, which lies at an intersection between all three branches of government, are particularly vulnerable to attack from many different angles. Where judicial deference, as an abstract concept, was able to survive the push towards deregulation because it became an issue that cut across segments of both political parties the *Chevron* doctrine as the practical manifestation of judicial deference to agency interpretation creates a single target for criticism. In particular, criticism of judicial deference has shifted from the area of deregulation to the area of separation of powers. Professor Turley notes that "…how *Chevron* is viewed differs [depending on] whether you view it from a constitutional standpoint or from an

administrative law standpoint….[115]" During the 1980s, judicial deference was approached from an administrative standpoint, focusing on how it affects the proliferation of agency rules. The academic opposition that existed during the Bumpers-era was neither as vocal nor as prolific in the case of SOPRA, despite both having the same effects. Framing the issue as a matter of separation-of-powers rather than an issue of placing "the bureaucratic thumb on the scales of justice," judicial deference is shifted from an issue that cuts across the political regime to one that the political system is more equipped to handle. As the boundaries of judicial deference were tested and criticism of the doctrine is redirected towards less cross-cutting lenses, Congress again became less willing to continue their own deference to the judiciary and issues that were temporarily suppressed may once again become salient in the eyes of Congress.

Mead, Brand X, City of Arlington, and Burwell: Changes to the Chevron Doctrine in the 21st Century

One of the most striking aspects of the changes made to the *Chevron* doctrine is that there is neither a clear, constant retreat from the judicial deference nor a sustained expansion in *Chevron*'s scope. Although the Supreme Court has issued a number of rulings related to *Chevron*, four cases in particular standout as significant changes to the doctrine. Each of these four cases altered the scope of *Chevron* in a way that either shifted the theoretical foundations of judicial deference towards a delegation justification or exposed the doctrine to increased criticism from a separation of powers perspective. These cases also brought forward the divisions within the Court on the issue of judicial deference and resulted in splits within the judiciary. Richard Pierce notes that "the only thing that emerges clearly from these opinions is that the

[115] (The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies 2016, 8)

Justices differ significantly with respect to their views on the scope of *Chevron*."[116] The Court's changing view of *Chevron* paved the way for future criticisms of the doctrine that returned judicial deference to the focus of Congress and the dominant political regime. Many of these broad changes to *Chevron* have reinforced the role of Congress as the ultimate arbiter in the field of judicial deference to agencies.

The first case in particular, *U.S. v. Mead* (2001),[117] raised the possibility that *Chevron* may not be entirely justifiable on separation of powers grounds and that judicial deference is ultimately a creature of the legislative branch. The *Mead* case represents the first major change to the *Chevron* doctrine since its inception in 1984. The decision limited the application of *Chevron* deference to cases where the agency makes a regulation with the force of law, *i.e.* in cases where the regulation has undergone formal rule-making procedures. In cases where the agency regulation does not have the force of law, such as a tariff schedule, *Chevron* deference does not apply and the Court instead relies upon the *Skidmore* balancing test to determine whether or not to accept the agency's interpretation. This new version of *Chevron*, sometimes called the *Mead* doctrine, significantly changed the scope and rationale for judicial deference. After *Mead*, *Chevron* deference would only be accorded only if there was an "indication on the statute's face that Congress meant to delegate authority to [the agency]."[118] Although this "indication" could arise implicitly through the formal rule making process, the need for this type of indication greatly limited the applicability of *Chevron* deference. In practice, this meant that not all authoritative agency rules were qualified for *Chevron* deference.

[116] (Pierce 2009, 172)
[117] (United States v. Mead 2001)
[118] *Ibid.*

Beyond simply limiting *Chevron* deference, *Mead* was significant for revitalizing the *Skidmore* balancing test. A key difference under *Skidmore* is that once the Court has ruled on the correct interpretation of a statute, the meaning of that statute is then set in stone without further rulings from the Supreme Court. By reviving *Skidmore*, the Court retakes the ability to substitute its own policy judgements for those of the agencies, shifting away from the separation-of-powers justification[119] for strong deference. Ilya Sharpiro argues that "*Mead*…makes it clear that *Chevron* deference does not arise directly from constitutional separation-of-powers principles… [and therefore] Congress could by statute eliminate the *Chevron* doctrine."[120] One of the innovations of the *Chevron* doctrine discussed earlier was its appeal to democratic theory and the relative "political accountability" of the executive over the judiciary as a rationale for judicial deference.

Mead shifted away from the separation-of-power argument by suggesting that judicial deference is more justified as a matter of delegation of power from Congress to agencies than as a matter of judicial restraint. Then-law professor Elena Kagan and David Barron argue that "*Mead* represents the apotheosis of… the treatment of *Chevron* as congressional choice, rather than either a constitutional mandate or judicial doctrine."[121] The Court defers to agencies not because of a concern that unelected judges ought not to substitute their own policy views for those of a more accountable agency. Rather, the Court defers to agencies because it believes that Congress willed the agency a degree of flexibility in the matter. The *Mead* decision made the *Chevron* doctrine, and judicial deference in general, vulnerable on the grounds that judicial

[119] See *Chevron*'s Domain by Thomas Merrill and Kristin Hickman
[120] (City of Arlington v. FCC 2013)
[121] (Barron and Kagan 2002, 212)

deference to agency interpretations was essentially under the control of Congress, rather than being an exercise in restraint by the courts.

Another issue raised by *Mead* was the administrative problem of "ossification" of statutory interpretation by the courts. Decisions made under weaker deference, like *Skidmore* deference, are subject to reversal only through subsequent court decisions. Justice Scalia was particularly concerned with ossification, warning that "it will be positively bizarre when [ossification] occurs simply because of an agency's failure to act by rulemaking before the issue is presented to the courts."[122] Although the issue of ossification was one internal to the judiciary, the concern surrounding it was enough to motivate the Court to undertake the next major change to the scope of the *Chevron* doctrine in *National Telecommunications Services v. Brand X Internet Services* (2005).[123]

The decision in *Brand X* generated a substantial amount of controversy centered around its approach to judicial deference and *stare decisis*. In the decision, the Court ruled, eight to one, that agency rules subject to *Chevron* deference not only overpower previous agency interpretations of the same statute, but also supersede any interpretations of that statute made by the lower courts. *Brand X* essentially split the *Chevron* doctrine in two, with one type of *Chevron* applying to the Supreme Court and another type applying to circuit courts. The Supreme Court, which is not subject to executive reversal of decision making under *Brand X*, operates under *Chevron* Supreme, while the lower courts operate under *Chevron* regular.[124] Justice Scalia, dissenting, argues that "the Court today moves to solve [ossification] of its own creation by inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive

[122] (United States v. Mead 2001)
[123] (National Telecommunications Services v. Brand X Internet Services 2005)
[124] (Barnett and Walker 2017)

officers."[125] This concern, that officers from the executive branch can reverse the decisions of lower courts, raised separation-of-powers concerns. Indeed, Scalia calls the decision in *Brand X* "not only bizarre…[but] probably unconstitutional." Although the empirical effects of *Brand X* are debated,[126] a common criticism of the decision, supported or not, is that it creates a tear in the separation-of-powers between the judiciary and the executive. Abbe Gluck argues that the significance of the decisions rests in the "wholesale transfer of statutory interpretation authority from federal courts to agencies."[127] The *Brand X* decision, although based on an administrative desire to avoid the ossification of statute, greatly increased concerns surrounding the relationship between judicial deference and separation-of-powers.

The Court's expansion of *Chevron* deference continued in *City of Arlington, TX v. FFC*.[128] This majority opinion in this case expanded *Chevron* deference by ruling that agencies themselves could interpret their own statutes regarding jurisdiction. Essentially, it was now up to the discretion of agencies, subject to *Chevron,* to determine where and when the boundaries of their jurisdictions end. Testifying before the Committee on the judiciary, Professor Turley expressed separation-of-powers concerns about allowing agencies to determine the scope of their own jurisdictions, saying "we always assume that would be the Rubicon, at least agencies wouldn't get deference on defining their own jurisdiction. And I think Congress needs to attack that very aggressively."[129] Agencies with the power to define their own jurisdiction would have substantially more power and fewer restraints than if their jurisdiction was defined by the courts. As a separation-of-powers issue, this places even more power in the hands of the executive and

[125] *Ibid.*
[126] See Sze, Wesley, "Did X market the Spot: Brand X and the Scope of Agency Overrides of Judicial Decisions," *Stanford Law Review*, January, 2016, arguing that "Brand X was not as momentous a decision as initially predicted"
[127] (Gluck 2014, 625)
[128] (City of Arlington v. FCC 2013)
[129] (The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies 2016, 108)

implies that Congress explicit or implicitly intends to delegate jurisdictional powers. Chief Justice Roberts, in his dissent, raises separation-of-powers concerns over allowing agencies to determine their own jurisdiction and argues that, under the Constitution, "Our task…to fix the boundaries of delegated authority…is not a task we can delegate to the agency."[130] A large portion of Chief Justice Roberts dissent focuses on highlighting separation of powers. The separation-of-powers issues raised by, and in, *Arlington* did not go unnoticed on the Court and, even before the decision, there were growing concerns about *Chevron* in conservative intellectual thought.

Conservative criticisms of *Chevron*'s constitutionality vis-à-vis separation-of-powers appeared in *City of Arlington* through an *amicus curiae* brief submitted by the Cato Institute, a prominent conservative think tank. This brief warned that judicial deference to an agency's interpretation of its own jurisdiction "is inconsistent with… the system of checks and balances established by the Constitution."[131] By the time of *Arlington*, conservatives were beginning to adopt the view that judicial deference was an unacceptable and unconstitutional delegation of legislative and judicial powers to the executive agencies. The brief specifically highlights the nondelegation doctrine issues of *Chevron* as well as the control of judicial deference to agencies that Congress should ultimately possess. These arguments, made by members of the conservative intellectual movement, represent a broad shift in attitudes towards deference. Rather than thinking of judicial deference merely in terms of its regulatory or deregulatory effects, there was a growing and substantial concern surrounding whether judicial deference to agencies was even constitutional, regardless of its desirability as a policy.

[130] (City of Arlington v. FCC 2013)
[131] *Ibid*

Interestingly, despite the expansions to *Chevron*'s domain in the preceding cases, the Court implied two years later in *King v. Burwell* (2015)[132] that there may be serious limits on how far the concept of "implicit" delegation can be taken. Writing for the majority, Chief Justice Roberts argued that agencies may not be eligible for *Chevron* deference on "a question of deep 'economic and political significance'; had Congress wished to assign that question to an agency, it surely would have done so expressly."[133] This decision, like *Mead*, aligns *Chevron* deference and judicial deference in general closer to an issue of delegation, rather than one of judicial self-restraint. Unlike *Mead*, *Burwell* takes this delegation justification for deference on step further, arguing that there are some issues that are so significant that Congress could not have possibly meant to leave them up to the agency. Indeed, clear and outright concerns about the constitutionality of *Chevron* under the doctrine of separation-of-powers have begun to appear on the Court itself.

The constitutionality concerns raised by Justice Thomas in *Michigan v. EPA* (2015)[134] illustrate clearly that the problematic relationship between *Chevron* and separation-of-powers, which has grown as the Court has expanded some areas of the doctrine, have reached even into the Supreme Court itself. One of the notable elements of the debate over Bumpers was the significant opposition to the elimination of deference within the judiciary itself, particularly the courts. In the more recent debates over the constitutionality of the doctrine of judicial deference, this does not appear to be the case, as members of the judiciary have expressed concern over the doctrine. In his concurrence with the *Michigan v. EPA* decision, Justice Thomas writes that "these cases bring into bold relief the scope of the potentially unconstitutional delegations we

[132] (King v. Burwell 2015)
[133] *Ibid.*
[134] (Michigan v. EPA 2015)

have come to countenance in the name of *Chevron* deference."[135] Although he was not joined by any of the other justices, the appearance of this line of criticism in the Court is notable. Even though there had been criticism of the constitutionality or desirability of elements of *Chevron* on the periphery of the doctrine, Justice Thomas's dissent went a step beyond previous concerns, questioning the constitutional underpinnings of *Chevron* itself. Despite Justice Thomas's solitude in his concurrence, it appears that criticism of *Chevron* in the judiciary may be growing.

Perhaps one of the most significant recent developments in the judiciary's attitude towards *Chevron* and judicial deference in general was the elevation of Neil Gorsuch to the position of associate justice, taking the place of the late Justice Scalia. Where Justice Scalia had been the foremost advocate on the Court for *Chevron*,[136] Justice Gorsuch has expressed considerable concerns about the constitutionality of the *Chevron* doctrine, particularly relating to the separation-of-powers aspect of the judicial deference. In an opinion written while he was still a judge on the Tenth Circuit, Gorsuch excoriated *Chevron*, saying "the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution…."[137] This indictment of the *Chevron* doctrine is probably one of the most blunt and direct challenges to judicial deference on constitutional grounds. This decision, especially in light of Justice Gorsuch's elevation to the Supreme Court bench, highlights the extent to which *Chevron* is no longer simply seen as a tool for deregulation. Instead, an increasingly common refrain among conservatives in the judiciary and the intellectual community is that *Chevron*, at its theoretical core, is undesirable.

[135] *Ibid.*
[136] (Scalia 1989)
[137] (Guiterrez-Brizuela v. Lynch 2016)

The Renewed Political Debate and SOPRA

Perhaps just as important as the growth of these constitutionality concerns in the judiciary is that the wider political environment has also begun to reflect these critical, constitutional attitude towards *Chevron*, particularly in the Republican Party. The 2016 Republican Platform states, as one of its planks, that "we further affirm that courts should interpret laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities."[138] Although this plank does not mention judicial deference directly by name, it does criticize the underlying principles of *Chevron* deference, particularly the flexibility it gives agencies in reinterpreting their statutes. It is worth noting that the mere mention of judicial deference in the 2016 platform is a significant departure from the 1980 platform, when judicial deference had previously been a topic of debate. Indeed, while the 1980 platform simply stated that Congress must reduce its delegation of power to agencies, the 2016 platform takes care to mention both Congress and the judiciary in its calls for reigning in the power of administrative agencies. Although the party platform is a list of aspirations and promises, rather than a clear to-do list, the mention of judicial deference in the platform signals that its elimination has a broad enough appeal to be a stated goal of the Republican Party. Beyond the platform, there has also been a renewed debate within Congress about the desirability of judicial deference.

The debate in Congress demonstrates how judicial deference, once an issue that cut through both parties, has instead become an issue the cut between the two parties. Congress has recognized the growing turmoil within the judiciary surrounding the *Chevron* doctrine in particular and has engaged in lengthy discussions of the doctrine, holding a hearing directly on

[138] (Republican Party Platform 2016)

Chevron in 2016.[139] This hearing was the first formal discussion of judicial deference since the hearings on the Administrative Procedures Act of 1981, which focused on the Bumpers Amendment. Importantly, unlike like the hearings in 1980, which only looked at judicial deference as part of a wider package of regulatory reform, the 2016 hearing singled out judicial deference to agencies and focused solely on *Chevron*.

One reason for this exclusive focus on deference may be that Congress recognized that the courts themselves were presenting a unified view of judicial deference. The chairman of the Subcommittee on Regulatory Reform, Tom Marino (PA-R), in his opening statement, explicitly notes Justice Thomas's concerns about *Chevron*'s constitutionality from his concurrence in *Michigan v. EPA.*[140] Although Justice Thomas's comments in his concurrence were not joined by any of the other justices, his apprehension was noticed by members of Congress. The branches of government do not exist in isolation and, especially in areas where all three branches overlap, concerns that originate in one branch are noticed by the other branches. This hearing is particularly interesting in the way that it differs from the previous hearings on the Bumpers Amendment in terms of the way the discussion surrounding judicial deference is framed and that the way that those difference seem to be informed by, or at least reflect, the constitutional anxieties that developed with the expansions and contractions of the *Chevron* doctrine.

One of the most important differences between the *Chevron* hearing and the hearings involving the Bumpers Amendment is the shift in Congress's focus from whether judicial deference and its removal could be used as a tool to constrain regulations to whether the doctrine violates separation-of-powers principles. The Chairman of the Committee on the judiciary, Bob

[139] (The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies 2016)
[140] *Ibid.*, 2

Goodlatte (VA-R), argues in his prepared statement that "…judicial deference under *Chevron* weakens separation of powers, threatening liberty."[141] Many of the concerns driving the Congressional inquiry into *Chevron* centered on its apparent violation of separation-of-powers principles, which seemed to premise Republican skepticism of the doctrine. These concerns formed a large portion of Professor Turley's testimony in the hearing, where he warns that "*Chevron* is a deeply problematic subject" from a constitutional point of view.

It is important that Professor Turley raised the constitutional concerns surrounding *Chevron* directly before members of Congress. Constitutional judicial deference concerns that had not been prevalent in the academic community during the 1980s had grown during the interceding 30 years, particularly in response to cases such as *Brand X* and *City of Arlington*. Just as importantly as the existence of these concerns is that they have been transferred and brought to the attention of Congress by academics. By testifying before Congress, views that would have been confined to law journals can be aired openly in public and taken up by the major political parties, in this case the Republican Party shifting its view of judicial deference from an administrative issue to a constitutional one.

The most recent attempt to reign in judicial deference to agencies, the Separation of Powers Restoration Act, illustrates how the political divide caused by judicial deference has changed. In contrast to the Bumpers Amendment, which split both the Republican and Democratic parties on the acceptability of judicial deference to agencies, the elimination of deference through SOPRA instead merely divide Congress along party lines, with the 2016 version passing the House of Representatives 239-171. In Committee on the judiciary report,[142]

[141] *Ibid*, 4.
[142] (Separation of Powers Restoration Act of 2016 Report 2016)

the majority view focused particularly on the constitutional issues of *Chevron*, arguing that the doctrine contains constitutional issues related to check and balances which necessitate the passage of SOPRA to remedy. Given the 2016 vote for SOPRA, in which all Republican members of the House voted for passage, it seems that, by reframing deference as a constitutional issue rather than an administrative one, Republican leaders in Congress have managed to avoid the divisions that arose during the Bumpers Amendment. Indeed, it appear that having *Chevron* as the avatar of judicial deference seems to have limited the scope of the conversation. Although SOPRA would eliminate all forms of judicial deference to agency statutory interpretations, most of the report focused on justifying the elimination of strong levels of deference like *Chevron*, with only a brief section at the end of the majority report acknowledging the weaker *Skidmore* deference.[143]

Interestingly, the Democratic viewpoint of *Chevron* remained firmly rooted in an administrative prospective. Ranking member of the Committee on the judiciary, John Conyers (MI-D), focused his opening statement on the benefits of regulations allowed by *Chevron* and the costs that would be imposed by increasing judicial review of agency actions.[144] The minority report on SOPRA also argues strongly for the administrative view of *Chevron*, rather than the constitutional one, devoting a section of the report titled "*No Evidence Exists Proving that Regulations Have a Significant Adverse Impact on Jobs, Wages, or Innovation*" to elaborating on the benefits of regulation.[145] This section notably continues for last half of the minority report without even mentioning *Chevron* or judicial deference to agencies. While the majority report focused on *Chevron* throughout the document, almost to the exclusion of the other elements of

[143] *Ibid, 10.*
[144] (The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies 2016, 5-6)
[145] (Separation of Powers Restoration Act of 2016 Report 2016, 38)

judicial deference, the minority report instead focuses on the regulatory aspects to the point of ignoring the nominal subject.

What the debate around SOPRA suggests is that new viewpoints for old, cross cutting issues can be introduced to Congress as a result of actions by the judiciary and by the larger legal community. As these viewpoints grow in prominence, as the constitutional concerns surrounding *Chevron* did as the doctrine evolved, they sometimes replace older viewpoints that have caused intra-party divides. In the case of the Republicans, reframing judicial deference as a constitutional issue and focusing very closely on the deficiencies of *Chevron*, nearly eliminated the political divides within the party that arose during the Bumpers debate. The administrative lens, which had led to a split on the issue of whether to deregulate using the courts or the executive, was abandoned and the newer constitutional lens, backed more strongly by academic support, was adopted in its place. Once the division caused by the deregulation issue was eliminated, Congress appears to have ended its period of deference to the judiciary and begun to move forward again with a push to eliminate of judicial deference. The salience of the issue, which had been reduced after Bumpers, increased as the way that members of Congress perceived judicial deference changed.

Chapter 5: Conclusion

Judicial deference and *Chevron* are a product of complex times and a testament to ways that the American system of government has changed in response. Although the bureaucracy is often referred to as the "fourth branch of government," it is in many ways a product of an overlap of power between the three formal branches of government. The power possessed by agencies is not inherent in the administrative state, but a product of compromise between the branches of government. Judicial deference is one manifestation of this compromise in which the judiciary has, in principle if not in practice, to limit the amount of discretion it has in substituting judgement in the many regulatory cases that come before the courts. The trajectory of the *Chevron* doctrine and its evolution provide an insightful look into how changes in the way that controversial issues are fundamentally viewed can help unite otherwise diverse political coalitions. *Chevron* highlights the importance of framing issues in politics. *Chevron* itself is a product of viewing judicial deference through an administrative and policy lens. The debate over whether or not judicial deference was acceptable from a practical, administrative standpoint created a complex issue that split the dominant political regime. Whether or not one sees judicial deference as good policy depends on the views one hold towards the desirability of regulation, the desirability of judicial discretion, and what the full of extent of executive power should be. With so many different variables involved in decision making, it is perhaps not surprising that this administrative frame ultimately that led to Congress, unable to fully decide on judicial deference itself, deferring to the judiciary's own views.

Political coalitions do not always move in lockstep, even within the same political parties. This observation is part of the key to understanding the *Chevron* puzzle. The Reagan-era push for deregulation did not take the same form as deregulation in the Carter-era and supporters

of Carter-era deregulation were not always in agreement with supporters of Reagan-era regulation. There is a certain irony in the fact that one of the potentially most significant pieces of anti-regulatory legislation was proposed by a very liberal Democrat[146] and defeated by the election of very deregulatory conservative. The politics of exactly how to go about deregulation, or at least reign in agencies, were fractured during the transition into the Reagan era and the intellectual community of the time was strongly opposed to the elimination of judicial deference from an administrative view.

Changing how the issue of *Chevron* and judicial deference was framed proved important in creating a cohesive political coalition. This finding is consistent with previous research indicating that conservatives use "constitution-talk" in order to create a strong, unified front on specific issues. In fact, the debate surrounding SOPRA mirrors the observation that "liberal politicians have insisted on employing policy arguments in situations that conservatives have framed as constitutional, making little or no reference to the Constitution."[147] The Democratic argument about judicial deference, and regulation more generally, as correct policy does not engage the Republican concerns that *Chevron* is wrong constitutionally. In these cases, the discourse used by one party is incompatible with the language of the other. It is possible that something can be recognized as good policy but deemed unconstitutional all the same.[148] What may be good policy is not always constitutional and what may be bad policy can be constitutional.

[146] Senator Bumpers was rated 95% on liberal issues by Americans for Democratic Action, a liberal political organization, and was referred to as the "liberal stalwart of Arkansas" in his New York Time Obituary
[147] (Kersch 2018, 1104)
[148] See e.g. Rabe, Bethany. 2008. "The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy But Bad Law." Utah Law Review.

The intellectual conversation surrounding *Chevron* provides a picture into how conservative have been able to constitutionalize certain issues and why they may not have done so with the same issues in the past. These ideas are not generated out of thin air and are "the product of movements and organized interests."[149] The case of judicial deference demonstrates the role that the larger intellectual field can play in generating the national political discourse. While these intellectual movements were certainly important in the development of constitutional law, they also help in form wider constitutional discussions. Judicial deference prior to *Chevron* was, in the eyes of legal academics and the judiciary, primarily an issue of administrative necessity and an exercise in administrative law. The Bumpers Amendment, Levin contended, would "add appreciably to the workloads of the federal courts."[150] When the intellectual community was almost unanimous in viewing judicial deference as an administrative issue, there was little room or basis to constitutionalize it. Instead, the debate focused mostly on policy issues.

In the years after *Chevron*, however, the academic community began to consider strong judicial deference through a constitutional lens and that is what has driven the debate around judicial deference in recent years. Gordon Silverstein argues that "the Constitution and legal language, legal forms, legal ideas, and legal arguments are deeply cherished aspects of American political culture."[151] When this constitutional language exists, the issue is reduced or perhaps elevated to its core constitutional acceptability. Before constitutional-talk can reach the political realm, this language must exist first and be develop within the academic community. And if academic thought can shape how the Court views its mission and itself,[152] in areas of overlap

[149] (Kersch 2018, 1089)
[150] (Levin 1979, 596)
[151] (Silverstein 2009, 267)
[152] (Kersch 2018)

between the branches, it may also affect how the other branches view their own mission or responsibilities regarding the issue. If law can "limit, direct, shape, and constrain" politics,[153] it may also provide new dimensions to the political discussion and inform the larger debate when an issue involved the powers of different branches of government.

What remains to be seen is if this new view of *Chevron* and judicial deference can hold together the Republican coalition on judicial deference even in the face of a political transition to a Republican president from a Democratic one. The demise of Bumpers was possible because the judicial deference was considered a policy issue and, thus, the arrival of a deregulatory executive in Ronald Reagan suddenly made judicial deference to agencies "good" policy for Republicans. Policy positions can be shifted with relative ease as the circumstances that created them change. This is, in fact, what Justice Scalia found so compelling about the *Chevron* doctrine in the first place. *Chevron* made agency policy flexible, so as to adapt to the practical changes that occur in the real world over time.[154] Policies that may have been poor in the past may become better in time if real world circumstances change. This flexibility is more difficult with constitutional-talk.

Conservative may have backed themselves into a corner on judicial deference by choosing to adopt constitutional language over policy language. Silverstein notes that "politics is capable of highly specific decisions that can be reversed with the next election… but [law] may shape and constrain [a policy] advocate's options in the future."[155] So it is with constitutional-talk in the political branches. While our conception of the constitution may change over time and generations, often leading to "wrongly" decided cases,[156] it rarely does so in a short span of time.

[153] (Silverstein 2009, 4)
[154] (Scalia 1989)
[155] (Silverstein 2009, 283)
[156] (Gillman 2004)

If something is unconstitutional today, it is unlikely that it will become so by tomorrow. Recent cases[157] blocking deregulatory actions by executive agencies suggest that, from a policy level, judicial deference to agency statutory interpretation is still a useful tool in the deregulatory tool kit. If judicial deference has again become good policy for conservatives, however, the argument that it is bad from a constitutional standpoint remains. Just because there is a Republican in White House does not mean that *Chevron* raises any fewer concerns regarding separation-of-powers. The election of a Republican president may result in another period of extended Congressional deference to the judiciary or, now that the constitutional genie is out of the bottle, conservatives may continue to press for the end to judicial deference because, tied up in their own constitutional argument, they have no other choice.

[157] A good example is Sierra Club et al v. Ryan Zinke et al (2018), which granted a preliminary injunction temporarily halted the suspension of a federal methane regulation on the grounds that the suspension was "arbitrary and capricious."

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